DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-218 *** CAPITAL CASE ***
Title: Terry Tibbals, Warden, Petitioner
v.
Sean Carter
Docketed: August 22, 2011
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (08-4377)
Decision Date: May 26, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Aug 17 2011	Petition for a writ of certiorari filed. (Response due September 21, 2011)
Aug 17 2011	Appendix of Terry Tibbals, Warden filed.
Sep 8 2011	Order extending time to file response to petition to and including October 31, 2011.
Oct 28 2011	Brief of respondent Sean Carter in opposition filed.
Oct 28 2011	Motion for leave to proceed in forma pauperis filed by respondent.
Nov 7 2011	DISTRIBUTED for Conference of November 22, 2011.
Nov 8 2011	Reply of petitioner Terry Tibbals, Warden filed. (Distributed)
Feb 22 2012	DISTRIBUTED for Conference of March 16, 2012.
Mar 19 2012	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Mar 19 2012	Petition GRANTED.
Apr 20 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 25, 2012.
Apr 20 2012	The time to file respondent's brief on the merits is extended to and including July 20, 2012.
Apr 26 2012	Motion to appoint counsel filed by respondent Sean Carter.
May 8 2012	Motion DISTRIBUTED for Conference of May 24, 2012.
May 25 2012	Joint appendix filed. (Statement of costs filed)
May 25 2012	Brief of petitioner Terry Tibbals, Warden filed.
May 29 2012	Motion to appoint counsel filed by respondent GRANTED. Scott Michelman, Esquire, of Washington, D.C. is appointed to serve as counsel for the respondent in this case.
Jun 1 2012	Brief amicus curiae of the United States filed (also in 10-930).
Jun 1 2012	Brief amici curiae of Utah, et al. filed (also in 10-930).
Jul 9 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Jul 17 2012	Consent to the filing of amicus curiae briefs, in suport of either party or of neither party,

	received from counsel for petitioner.
Jul 20 2012	Brief of respondent Sean Carter filed. (Distributed)
Jul 23 2012	SET FOR ARGUMENT ON Tuesday, October 9, 2012
Jul 24 2012	CIRCULATED.
Jul 25 2012	Record received from U.S.C.A. for Sixth Circuit is electronic.
Jul 27 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. (also in 10-930)
Jul 27 2012	Brief amici curiae of Retired Federal Judges filed. VIDED. (Distributed)
Jul 27 2012	Brief amici curiae of American Psychiatric Association, et al. filed. VIDED. (Distributed)
Jul 27 2012	Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED.
Jul 27 2012	Brief amicus curiae of American Bar Association filed. (Distributed)
Aug 13 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Aug 20 2012	Reply of petitioner Terry Tibbals, Warden filed. (Distributed)
Aug 23 2012	Record from U.S.D.C. for Northern District of Ohio is electronic.
Aug 28 2012	Record recieved from U.S.D.C. for Northern District of Ohio Eastern Division. Transcripts and Exhibits. (6 Boxes)
Oct 9 2012	Argued. For petitioner: Alexandra T. Schimmer, Solicitor General, Columbus, Ohio. For respondent: Scott Michelman, Washington, D. C.
Oct 9 2012	Letter dated October 5, 2012 received from counsel for the respondent. (Distributed)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
AUG 17 2011
OFFICE OF THE CLERK

11-218

No. ____

In the Supreme Court of the United States

TERRY TIBBALS, Warden,

Petitioner,

v.

SEAN CARTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE—NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. Do capital prisoners possess a "right to competence" in federal habeas proceedings under *Rees v. Peyton*, 384 U.S. 312 (1966)?

2. Can a federal district court order an indefinite stay of a federal habeas proceeding under *Rees*?

LIST OF PARTIES

The Petitioner is Terry Tibbals, the Warden of the Mansfield Correctional Institution. Tibbals is substituted for his predecessor, Margaret Bradshaw. See Fed. R. Civ. P. 25(d).

The Respondent is Sean Carter, an inmate at the Mansfield Correctional Institution.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Terry Tibbals, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion, *Carter v. Bradshaw*, 644 F.3d 329 (6th Cir. 2011), is reproduced at App. 1a. The district court's opinion, *Carter v. Bradshaw*, 583 F. Supp. 2d 872 (N.D. Ohio 2008), is reproduced at App. 27a.

JURISDICTIONAL STATEMENT

The Sixth Circuit issued its opinion on May 26, 2011. The Warden files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4241(a) of Title 18 provides:

> At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Section 2254(d) of Title 28 of the United States Code, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

Alleging ineffective assistance of counsel, Sean Carter seeks to overturn his conviction and death sentence for the rape and murder of his adoptive grandmother. The Ohio courts rejected the claim eleven years ago, but the district court and the Sixth Circuit refuse to act on Carter's habeas petition.

The reason: The Sixth Circuit maintains that capital prisoners have a "right to competence" in federal habeas proceedings under *Rees v. Peyton*, 384 U.S. 312 (1966). Because Carter's mental illness "affect[s] his abilities to relay facts to his counsel and communicate in detail," App. 8a, the court ordered an *indefinite stay* of his proceeding under *Rees*.

To this day, the *Rees* case is shrouded in mystery. A capital prisoner attempted to withdraw his petition for certiorari. After the district court deemed him incompetent, this Court refused to act. Without explanation, it let the petition sit on the docket for three decades until the prisoner died.

The Court should grant review and resolve two contradictory visions of *Rees* in the lower courts. Most circuits adopt a narrow view of the case, invoking it to evaluate the validity of a capital prisoner's request to withdraw his habeas petition. But the Sixth Circuit divined a broad "right to competence" from *Rees*: Courts should stay habeas proceedings indefinitely whenever a capital prisoner's mental condition renders him "unable to communicate with his habeas attorneys." App. 12a.

Certiorari is warranted for two other reasons. First, the Sixth Circuit disregarded established limits on its habeas authority. To justify its stay

order, the court explained that Carter is unable to "provide . . . evidence in support of his claims" while incompetent. App. 12a. But no new evidence can be considered at this stage; AEDPA limits the prisoner and his counsel to "the record that was before the state court." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). The Sixth Circuit also disregarded this Court's carefully tailored framework for evaluating claims of post-conviction incompetence—and its requirements for exhaustion and state-court deference. See *Ford v. Wainwright*, 477 U.S. 399 (1986).

Second, the Sixth Circuit's decision is "an anomalous monkey wrench thrown into the capital-litigation process." App. 26a (Rogers, J., dissenting). The decision invites every capital prisoner to raise similar claims of incompetence; it opens the door to decades of collateral litigation; and it unnecessarily (and in many cases, eternally) forestalls the State's ability to carry out its criminal judgments.

This case more than satisfies the well-worn criteria for certiorari—lack of guidance from this Court, manifest disagreement in the lower courts, and a paramount State interest at risk. The Court should grant review and reverse the judgment below.

STATEMENT OF THE CASE

A. Carter raped and murdered his adoptive grandmother.

On September 13, 1997, Sean Carter snuck into the home of his adoptive grandmother Veader Prince. *State v. Carter*, 734 N.E.2d 345, 347 (Ohio 2000). Prince discovered Carter, asked him to leave her house, and gave him a set of car keys. *Id.* at 348.

Carter departed, but returned later that day. Finding the front door to Prince's house locked, he climbed in through a bedroom window. *Id.* at 349-50.

Carter encountered Prince, who again instructed him to leave. When Prince "tried to push him out the door," Carter "started to beat her." *Id.* at 350. He then raped Prince anally and stabbed her with a kitchen knife. A later autopsy indicated that Prince suffered eighteen stab wounds and blunt force trauma to the face. *Id.* at 349.

To cover up the murder, Carter piled clothes over Prince's body, moved furniture to hide blood stains, turned on the water in the bathroom, and placed a chicken on a stove. He then changed his bloody clothes, took $150 from Prince's purse, and stole a car from the driveway. *Id.* at 350.

On September 14, Prince's daughter and son visited the home, but could not find their mother. Returning that evening, they located Prince's dead body in the basement and called police. *Id.* at 348.

On September 15, officers in Pennsylvania located Carter sleeping in the stolen car. The officers contacted Ohio authorities, who indicated that they wanted Carter for questioning. *Id.* at 349. After waiving his *Miranda* rights, Carter confessed to murdering Prince. He waived extradition and returned to Ohio. *Id.* at 349-50.

B. A jury convicted Carter of murder and the trial court imposed a death sentence.

A grand jury indicted Carter for aggravated murder, aggravated burglary, aggravated robbery, and rape. See *Carter*, 734 N.E.2d at 350.

The trial court appointed an expert, Dr. Stanley Palumbo, to examine Carter's mental state. "With reasonable scientific certainty," Dr. Palumbo concluded that "Carter [was] competent to stand trial." *Id.* at 355. He testified that "Carter understood the nature of the proceedings against him and did not suffer any gross mental disorder that would interfere with his ability to participate in his defense." *Id.* In light of this report, the trial court deemed Carter competent to stand trial. *Id.*

Carter entered a plea of not guilty by reason of insanity, and three experts examined his mental state. The first, Dr. Stephen King, concluded that Carter "exhibited bizarre behavior" and "was not able to assist in his own defense" (although he admitted that his diagnosis "was a close call"). *Id.* The second expert, Dr. Palumbo, reaffirmed his earlier diagnosis: Carter was competent and "express[ing] anger and irritability with his attorneys." *Id.* at 356. A third expert, Dr. Robert Alcorn, agreed with Dr. Palumbo's conclusions. *Id.*

After examining the reports, the trial court found Carter competent. *Id.* The case proceeded to trial and Carter absented himself from most of the proceedings. *Id.* at 350. The jury convicted Carter of aggravated murder with death specifications, aggravated robbery, rape, and criminal trespass. After the penalty phase, the jury recommended a death sentence, which the trial court imposed. *Id.*

C. The Ohio Supreme Court affirmed the convictions and sentence, and the Ohio courts denied post-conviction relief.

On direct appeal, Carter challenged the trial court's competency finding. The Ohio Supreme Court rejected the claim: "The trial court's findings of fact fail to support Carter's claim that the court's decision was unreasonable, arbitrary, or unconscionable." *Carter*, 734 N.E.2d at 356. The court dismissed Carter's other objections and affirmed his convictions and death sentence.

Carter next sought post-conviction relief in the Ohio courts, attacking the performance of his trial counsel. He claimed that "his attorneys failed to develop a complete record to show that he was incompetent to stand trial because his paranoid personality did not permit him to trust, or therefore consult with and aid, his lawyers." *State v. Carter*, No. 99-T-133, 2000 Ohio App. Lexis 5935, at *10 (Ohio Ct. App. Dec. 15, 2000).

Carter submitted an affidavit by trial counsel, who confirmed that Carter "would not cooperate" or "discuss any aspects of the case or his personal life." *Id.* The affidavit also indicated that Carter "wanted to kill his attorney," that Carter's "mother and uncle were paranoid schizophrenics," and that Carter would appear in court only "if his attorneys bribed him with candy." *Id.* at *11.

The trial court denied relief, and the Ohio court of appeals affirmed. The appellate court concluded that "[n]either [Carter's] petition for postconviction relief nor his brief raise new grounds or point to anything outside the record to

demonstrate that he is entitled to relief" on his ineffective assistance claim. *Id.* at *13. The court further observed that Carter's "inability or unwillingness to aid his attorneys in the defense of his case [was] well-documented." *Id.*

The Ohio Supreme Court denied review. See *State v. Carter*, 746 N.E.2d 612 (Ohio 2001).

D. The federal district court found Carter incompetent and dismissed his habeas petition without prejudice.

In 2002, Carter sought habeas relief. He submitted a series of pleadings, culminating in 2005 with his third amended habeas petition. Also in 2005, Carter filed a "motion for competency determination and to stay proceedings." App. 28a.

The district court ordered a competency hearing. Carter's expert, Dr. Robert Stinson, testified that Carter had "schizophrenia," a "depressive disorder," and "a personality disorder." App. 30a. The condition, Dr. Stinson said, "distorts his inferential thinking," "affect[s] . . . his language and communication abilities," and prevents him from developing "a factual understanding of the proceedings." App. 30a-31a. Dr. Stinson agreed that "Carter could communicate with his attorneys, but indicated that "his schizophrenia renders him an 'unreliable historian.'"[1] App. 32a.

Carter's second expert, Dr. Michael Gelbort, agreed that Carter's "thinking skills are fragmented and distracted": Although Carter can provide "basic

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[1] Dr. Stinson filed an updated report two years later, indicating that "Carter's mental condition ha[d] deteriorated." App. 35a.

assistance . . . it's not worth a whole lot of time or effort on his attorneys' part because his cognitive capabilities are so limited." App. 33a.

The Warden's expert, Dr. Phillip Resnick, agreed that Carter has "chronic undifferentiated schizophrenia." App. 34a. But Dr. Resnick testified that Carter understood the nature of the murder conviction and the punishment: "[I]n my view, he meets the minimum standard because he can speak rationally and convey information." App. 35a. Dr. Resnick further indicated that Carter "can convey basic information, but . . . his illness does not permit him to give a rich description." *Id.*

After reviewing this testimony, the district court invoked *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003). App. 36a. In *Rohan*, the Ninth Circuit indicated that capital prisoners possess a "right to competence" in habeas proceedings, rooted in their statutory right to appointed counsel under 18 U.S.C. § 3599(a)(2).

Applying *Rohan*, the district court concluded that several of Carter's habeas claims—that he was incompetent at his trial, and that his attorneys were ineffective in pursuing the claim—"potentially could benefit from Carter's assistance." App. 42a-43a. The court then evaluated Carter's mental state: Although Carter's capacity to understand his position and the proceedings was "debatable" and "a difficult decision," his "diminished . . . ability to communicate with counsel" was "clear-cut." App. 45a. Under the *Rohan* standard, the district court determined "that Carter [was] incompetent to proceed with this federal habeas litigation." App.47a.

In light of that finding, the district court "dismisse[d] without prejudice" the habeas petition and "prospectively toll[ed] the one-year statute of limitations set forth in 28 U.S.C. § 2244(d) . . . until such time as . . . Carter is competent to proceed with his federal habeas litigation." App 53a.

E. The Sixth Circuit directed the district court to stay Carter's petition indefinitely due to incompetency.

On appeal, the Sixth Circuit agreed with the district court's bottom-line ruling, but not its specific analysis or remedy. The court did not find a "right to competence" under *Rohan* or 18 U.S.C. § 3599. Instead, the Sixth Circuit held that Carter enjoyed a right to competence under *Rees v. Peyton*, 384 U.S. 312 (1966) and 18 U.S.C. § 4241—the federal statute discussing a criminal defendant's competence at trial. App.4a-5a.

In this case, Carter "refused to meet with his attorneys to discuss collateral attacks on his conviction" and he "suffered from multiple psychological disorders affecting his abilities to relay facts to his counsel." App. 8a. Given those findings, the Sixth Circuit affirmed the district court's competency determination. *Id.*

But the Sixth Circuit said "it was improper for the district court to dismiss Carter's petition and prospectively toll the AEDPA statute of limitations indefinitely." App. 11a. Instead, the Sixth Circuit said the district court should have followed the Ninth Circuit's remedy in *Rohan*—"habeas proceedings should be stayed until the petitioner is found to be competent." App. 14a.

The Sixth Circuit instructed the district court to stay indefinitely its consideration of Carter's ineffective assistance claim. App. 15a. As to the remaining habeas claims, the Sixth Circuit directed the district court "to determine whether Carter's assistance is essential to their full and fair adjudication." *Id.* If "Carter's other claims might possibly be litigated without his assistance," App. 13a, the Sixth Circuit instructed the district court to appoint a next friend to litigate on Carter's behalf.

Judge Rogers dissented. He argued that the majority's decision "allows habeas petitioners to prevent States from enforcing their judgments, potentially forever, on the grounds of a nonexistent right to competency in habeas proceedings." App. 15a-16a. That right, he said, "has no basis in the Constitution or federal statues." App. 16a.

REASONS FOR GRANTING THE WRIT

The Court should grant the Warden's petition for three reasons. First, the Sixth Circuit's novel interpretation of *Rees v. Peyton*, 384 U.S. 312 (1966)—that habeas petitioners have a "right to competence"—is shared by no other circuit.

Second, the Sixth Circuit's decision runs headlong into AEDPA and *Ford v. Wainwright*, 477 U.S. 399 (1986). The court ordered an indefinite stay of a capital habeas proceeding—something that AEDPA prohibits. And the court's opinion circumvents *Ford*'s procedural and substantive limitations on post-conviction incompetency claims.

Third, this decision will improperly bring Ohio's capital litigation to a halt. Under the Sixth Circuit's extraordinarily loose standards, any

prisoner can make a minimal showing of incompetence, demand a hearing, and secure an indefinite stay of his habeas proceedings.

A. The significance of *Rees v. Peyton* is an open and disputed question.

1. The Court has never clarified *Rees*.

In *Rees*, a capital prisoner instructed his attorney to withdraw his pending petition for certiorari. 384 U.S. at 313. Counsel objected, indicating that "he could not conscientiously accede to these instructions without a psychiatric evaluation." *Id.* This Court stated that "it [was] ultimately the responsibility of this Court to determine" "[w]hether or not Rees shall be allowed in these circumstances to withdraw his certiorari petition." *Id.* The Court then remanded the case to the district court to determine "whether [the prisoner] ha[d] capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or . . . whether he [was] suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id.* at 314.

After the district court found the prisoner incompetent, this Court, in an unexplained order, "held without action" the petition for certiorari. *Rees v. Peyton*, 386 U.S. 989 (1967). Decades passed. When the prisoner died in 1995, the Court finally dismissed the petition. See *Rees v. Superintendent of the Va. State Penitentiary*, 516 U.S. 802 (1995).

The Court has never again ordered such relief, although others have requested it. Just last term, a capital prisoner filed a petition for certiorari and

invoked *Rees*. Alleging incompetence, the prisoner requested a competency determination and sought a stay of the proceedings. The Court summarily denied the request and the petition. See *Bedford v. Collins*, 130 S. Ct. 2344 (2010).

In fact, the Court has shown very little interest in *Rees* over the years. Despite the high number of capital habeas petitions and incompetency claims on the Court's docket, the case makes only one other appearance in the United States Reporter. See *Whitmore v. Arkansas*, 495 U.S. 149, 166 (1990) (citing *Rees* to deny standing to a "next friend" who attempted to pursue an appeal on behalf of a capital prisoner). Several dissenting opinions mention the case, but only to reiterate the standard for reviewing a prisoner's request to terminate his habeas rights. See, e.g., *Rumbaugh v. McCotter*, 473 U.S. 919, 919 (1985) (Marshall, J., dissenting) ("*Rees* specified the findings necessary to a determination that one who seeks to waive further review of a criminal conviction is competent to make such a grave choice.").

In short, the Court has never explained *Rees* or the basis for its "hold without action" choice.

2. Most circuits interpret *Rees* to require a competency hearing before a court allows a prisoner to waive habeas relief.

In most federal circuits, *Rees* is relied on in one discrete situation—"where a death-row inmate elects to abandon further legal proceedings." *Smith v. Armontrout*, 812 F.2d 1050, 1057 (8th Cir. 1987); accord *Brewer v. Lewis*, 989 F.2d 1021, 1026 n.4 (9th Cir. 1993) (*Rees* "state[s] the test for determining

whether a habeas petitioner is competent to waive his right to federal review of his conviction and sentence."); *Rumbaugh v. Procunier*, 753 F.2d 395 398 (5th Cir. 1985) (same).

In those cases, *Rees* provides "the controlling legal standard for assessing the validity of a death row inmate's choice to forego post-conviction review." *Henderson v. Haley*, 353 F.3d 880, 893 (11th Cir. 2003). "An appeal may not be withdrawn if the prisoner is incompetent." *Michael v. Horn*, 459 F.3d 411, 420 (3d Cir. 2006). If a court "ha[s] any doubts about [the prisoner's] competency," *Rees* demands a hearing. *Id.*

The Ninth Circuit's take on *Rees* is particularly revealing. Although the court affords capital prisoners a "right to competence" in their federal habeas proceedings, it does *not* ground that right in *Rees*. Rather, the Ninth Circuit locates the right in 18 U.S.C. § 3599, which supplies appointed counsel to capital prisoners. See *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 813 (9th Cir. 2003).

To be sure, the Ninth Circuit's reading of § 3599 is open to debate.[2] See App. 20a (Rogers, J., dissenting) (criticizing *Rohan* because the provisions of § 3599 "say nothing about the competency of the petitioner"). But the court offered one significant observation: Whether or not capital prisoners have a right of "competence to pursue collateral review of a state conviction in federal court . . . is an issue the Supreme Court precedents do not conclusively resolve." *Rohan*, 334 F.3d at 810.

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[2] The State of Arizona is seeking review of *Rohan*'s holding. See Pet'n for Cert., *Ryan v. Gonzales*, No. 10-930.

3. The Sixth Circuit interprets *Rees* to establish a "right to competence" for capital habeas petitioners.

For decades, the Sixth Circuit applied *Rees* narrowly like its sister circuits do—to "cases where a death row inmate seeks to forego further appeals." *Harper v. Parker*, 177 F.3d 567, 571 (6th Cir. 1999). If a court "'believe[s] that the defendant may be . . . suffering from a mental disease or defect,'" it should conduct "a preliminary hearing" to discern whether he is competent "to waive his right to further appeals." *Id.*

Recent proceedings illustrate this practice. In *Awkal v. Mitchell*, a capital prisoner informed the Sixth Circuit of his desire to withdraw his habeas petition. Consistent with *Rees*, the court stayed its proceeding and instructed the district court to conduct a competency hearing. See *Awkal v. Mitchell*, No. 01-4728, 2006 U.S. App. Lexis 5984, at *4 (6th Cir. Mar. 8, 2006).

After the district court found the prisoner incompetent, a Sixth Circuit panel denied his request to terminate the appeal and proceeded to issue a decision on the merits, granting habeas relief. See *Awkal v. Mitchell*, 559 F.3d 456 (6th Cir. 2009). The en banc court then reversed that decision. See *Awkal v. Mitchell*, 613 F.3d 629 (6th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1002 (2011). Although every member of the Sixth Circuit—the majority and the dissenters—recognized the prisoner's incompetence, not one contemplated the need for an indefinite stay under *Rees*.

The Sixth Circuit took the very opposite approach here. The court announced that capital habeas petitioners possess "a statutory right to competence" because the *Rees* decision incorporated the federal competency-to-stand-trial statute, 18 U.S.C. § 4241, into habeas proceedings. App. 4a-5a.

The Sixth Circuit further announced that *Rees* may be invoked "by action or inaction." App. 7a. Unlike the *Rees* prisoner, who expressly sought to "withdraw [his] petition and forgo any further legal proceedings," 384 U.S. at 313, Carter has never attempted to terminate this litigation. No matter, the Sixth Circuit said, because district courts may conduct competency hearings under *Rees* whenever (1) the prisoner "refuse[s] to meet with his attorneys to discuss collateral attacks"; and (2) his attorneys express concern that the prisoner "[can]not understand the proceedings or assist counsel in his defense." App. 8a.

The Sixth Circuit's decision creates two clear divisions in lower court authority. First, it held that this Court established the "right to competence" on federal habeas review "long ago" in *Rees*. App. 4a. No other circuit adopts that view. To the contrary, these others courts recognize that the issue of competence in habeas proceedings is one that "the Supreme Court precedents *do not conclusively resolve*." *Rohan*, 334 F.3d at 810 (emphasis added).

Second, the Sixth Circuit held that *Rees* may be invoked in a variety of situations and absent a request to terminate post-conviction proceedings. Other circuits take a far more constrained view: The standards in *Rees* are used only to "assess[] the validity of a death row inmate's choice to forego post-

conviction review." *Henderson*, 353 F.3d at 893. Where the prisoner does not "direct[] his counsel to withdraw his petition . . . and to forgo any further federal habeas proceedings," *Michael*, 459 F.3d at 420, these circuits do not apply *Rees*.

The disagreement across the circuits is stark. The Court should grant certiorari and resolve these divergent approaches to *Rees*.

B. The Sixth Circuit's decision is in tension with this Court's habeas jurisprudence.

Even without the circuit split, this case would still be worthy of review because the decision below is incompatible with AEDPA and *Ford v. Wainwright*, 477 U.S. 399 (1986).

1. The Sixth Circuit's indefinite stay violates AEDPA.

After establishing a new pathway for incompetency claims, the Sixth Circuit crafted an exceptional remedy. Because the district court found Carter incompetent, the Sixth Circuit ordered an indefinite stay of his habeas proceeding.

According to the court, "Carter alone has evidence of the interactions between him and his trial and appellate attorneys, and that evidence is inaccessible as long he remains unable to communicate with his habeas attorneys." App. 12a. The only suitable response, the Sixth Circuit said, was an indefinite stay: The district court could not appoint a "next friend" to represent Carter in this litigation because "the next friend would be forced to proceed through this action without the foundational facts that support Carter's claims." App. 13a.

The Sixth Circuit's decision, premised on Carter's incompetence, is inconsistent with AEDPA. See *Rhines v. Weber*, 544 U.S. 269, 276 (2005) ("AEDPA . . . circumscribe[s] the[] discretion" of federal courts "to issue stays" in habeas proceedings). The Sixth Circuit mistakenly assumed that a stay was necessary to preserve Carter's ability "to provide . . . evidence in support of his claims." App. 12a.

But Carter will never have the opportunity on habeas review to offer evidence in support of his claims, even if he regains competency. Under AEDPA, "[t]he record under review is limited to . . . the record before the state court." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). The federal courts "are barred from considering . . . evidence" extraneous to the state court record. *Id.* at 1411 n.20. Therefore, any evidence that Carter might "later introduce[] in federal court is *irrelevant* to § 2254(d)(1) review."[3] *Id.* at 1400 (emphasis added).

Simply put, a capital prisoner's incompetence in no way obstructs his habeas attorneys' ability to advance, or the federal courts' ability to adjudicate, his habeas claims. For that reason, AEDPA prohibits the issuance of an indefinite stay based on a prisoner's incompetence.

---

[3] The Ninth Circuit made the same mistake in *Rohan*. Allowing a habeas proceeding to go forward, the court feared, would "prevent [the incompetent prisoner] from ever presenting th[e] evidence [within his private knowledge] to a federal tribunal." 334 F.3d at 818. If such evidence is not already included in the state court record, AEDPA precludes its consideration.

2. The court's decision supplants *Ford v. Wainwright*.

The Sixth Circuit's decision is monumental in a second respect: It effectively puts an end to this Court's decision in *Ford v. Wainwright*, 477 U.S. 399, 410 (1986), which "prohibits the State from carrying out a sentence of death upon a prisoner who is insane."

Three critical limitations inure to *Ford*-based incompetency claims. First, the test is demanding: To halt an execution, a court must find that the prisoner cannot rationally understand "the punishment [he is] about to suffer and why [he is] to suffer it." *Panetti v. Quarterman*, 551 U.S. 930, 957 (2007) (citation omitted). Second, the window to file the claim is limited: The prisoner must wait until his "execution is imminent." *Id.* at 946. Third, the prisoner must abide by AEDPA. To secure federal habeas relief, he must exhaust the *Ford* claim in state court and, upon returning to federal court, demonstrate that the state court's ruling is "contrary to" or "an unreasonable application" of clearly established federal law. 28 U.S.C. §§ 2254(b)(1)(A), (d)(1).

The Sixth Circuit's decision here undoes those constraints in several respects.

As a preliminary matter, the Sixth Circuit's definition of "incompetence" is looser than the *Ford* standard. Rather than investigating the prisoner's ability to comprehend his death sentence, the Sixth Circuit focuses on the prisoner's capacity for effective communication with his attorneys. Any mental illness could trigger that minimal standard.

Also under the Sixth Circuit's framework, incompetency claims ripen much sooner, and stay ripe for much longer, than *Ford* claims. Prisoners like Carter (who are nowhere near execution) can raise challenges at any point during their federal habeas proceedings—from the initial filing until the eve of certiorari review. No longer are they confined to the period before their execution date.

Finally, these incompetency claims skirt AEDPA. Under the Sixth Circuit's decision, a prisoner can bypass the state courts entirely, file his claim in federal court, and secure de novo review. If successful, the prisoner "prevent[s] [the] State[] from enforcing [its] judgments, potentially forever." App. 15a (Rogers, J., dissenting).

All told, the Sixth Circuit's "right to competence" displaces the *Ford* decision. The decision below does everything that *Ford* does, but on less rigorous terms—a lax definition of "incompetence," a long filing window, and no state court deference. Because capital prisoners can now litigate competency claims in this more favorable forum, they will no longer have any use for *Ford*.

In short, the Sixth Circuit's framework impermissibly circumvents AEDPA and *Ford*. Further review is therefore warranted.

C. The Sixth Circuit's decision obstructs Ohio's capital litigation system.

Certiorari is necessary for a third reason. As Judge Rogers observed below, the Sixth Circuit's decision is "an anomalous monkey wrench thrown into the capital-litigation process." App. 26a. It will

seriously and unnecessarily disrupt these proceedings.

First, the "right to competence," as defined by the Sixth Circuit, is easily invoked. The district court here ordered a hearing after "Carter . . . refused to meet with his attorneys" and his attorneys expressed fear that "Carter could not understand the proceedings or assist counsel." App. 8a. Any capital prisoner can replicate that scenario, request a competency hearing under *Rees*, and seek an immediate stay of proceedings. Cf. *Rhines*, 544 U.S. at 277-78 (observing that "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death").

Second, this process is quite protracted. Carter filed his habeas petition in 2002 and his competency motion in 2005. The district court issued a determination in 2008 and the Sixth Circuit affirmed that finding in 2010. Over eight years have passed without any consideration of the merits of Carter's habeas petition. A capital prisoner advancing a similar incompetency motion—no matter how frivolous—can expect a similar delay.

Third, the Sixth Circuit's decision gives birth to all sorts of collateral litigation. Most immediate, the Sixth Circuit instructed the district court to sort through Carter's remaining habeas claims and "determine whether Carter's assistance is essential to their full and fair adjudication." App. 15a. If the district court allows any claims to go forward, Carter will appeal. Next, the State will develop a medication plan in an effort to restore Carter to competency. Carter will presumably object to forced

medication, prompting another round of hearings and appeals. See, e.g., *Sell v. United States*, 539 U.S. 166 (2003). Finally, if Carter's condition improves, the State will ask the district court to lift the stay. As part of its new responsibility "to monitor Carter's on-going condition," App. 14a, the district court will appoint another coterie of experts, conduct another competency hearing, and issue another set of findings—and the displeased party will take yet another appeal.

Fourth, "competency" is not a static condition. A capital prisoner deemed competent at the start of his habeas proceeding may claim that he has later become incompetent. When habeas proceedings *span decades* (as they often do in the Sixth Circuit), a prisoner can seek several competency determinations. Each request then restarts this lengthy process.

And all these labors will be for naught: Contrary to the Sixth Circuit's assumption, see App. 12a-13a, prisoners like Carter (even if they regain competency) may not submit new evidence in a federal habeas proceeding. They must demonstrate an entitlement to relief using only "the record that was before that state court." *Pinholster*, 131 S. Ct. at 1398.

At bottom, the Sixth Circuit's "monkey wrench" forestalls the conclusion of an untold number of capital habeas proceedings and frustrates "the State's strong interest in enforcing its criminal judgments." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). If such consequences are to be imposed on the State and its citizens, they should occur only after careful deliberation from this Court.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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August 17, 2011

APPENDIX

Supreme Court, U.S.
FILED
AUG 17 2011
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11-218

No. ____

In the Supreme Court of the United States

TERRY TIBBALS, Warden,

Petitioner,

v.

SEAN CARTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 11a0146p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-4377

SEAN CARTER,

Petitioner-Appellee,

v.

MARGARET BRADSHAW, Warden,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Ohio at Toledo.
No. 02-00524—Peter C. Economus, District Judge.

Argued: December 2, 2010

Decided and Filed: May 26, 2011

Before: MARTIN, COLE, and ROGERS,
Circuit Judges

COUNSEL

ARGUED: Charles L. Wille, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for

Appellant. Linda E. Prucha, OHIO PUBLIC DEFENDER'S OFFICE, Columbus, Ohio, for Appellee. **ON BRIEF:** Charles L. Wille, Holly E. LeClair, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellant. Linda E. Prucha, Rachel Troutman, OHIO PUBLIC DEFENDER'S OFFICE, Columbus, Ohio, for Appellee.

MARTIN, J., delivered the opinion of the court, in which COLE, J., joined. ROGERS, J. (pp. 12-18), delivered a separate dissenting opinion.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. In this habeas action where petitioner Sean Carter is facing the death penalty according to his Ohio conviction, the district court found that Carter is incompetent, dismissed his petition without prejudice, and equitably tolled the Antiterrorism and Effective Death Penalty Act statute of limitations prospectively until he is competent to proceed. Respondent Warden Margaret Bradshaw appeals that decision. For the following reasons, we **AMEND** the district court's judgment and **REMAND** the case to the district court for proceedings in accordance with this opinion.

I. BACKGROUND

For a full description of the facts of this case, we point to the thorough order of the district court. We detail here only the facts necessary for our

discussion. After Carter exhausted the Ohio state review processes for his conviction, he was housed in a facility for prisoners with severe mental illnesses. His attorneys attempted to meet with him there to discuss avenues for collateral appeal, but he refused to see them. Worried that their client was incompetent and choosing to forego further appeals of his conviction and sentence, the attorneys filed Carter's habeas petition and a motion for a pre-petition competency hearing.

The district court held a competency hearing on May 1, 2006 at which experts for both parties agreed that Carter suffered from schizophrenia, personality disorder, and hallucinations. They also agreed that he was not able to fully and articulately communicate with his counsel, but they disagreed as to how well he could assist his counsel in his case. Carter's first expert, Dr. Robert Stinson, opined that Carter lacked a factual understanding of the proceedings. He explained that Carter could not provide details or elaboration, or engage in dialogue. Additionally, he explained that Carter did not believe he could be executed unless he volunteered, and that Carter could not accurately identify his attorneys, instead thinking that Bradshaw's expert, Dr. Phillip Resnick, was his attorney. Carter also called Dr. Michael Gelbort, a clinical neuropsychologist, who testified that Carter could not accurately describe historical events from his case and could not learn and retain new information. On the other hand, Resnick testified that Carter could provide basic details to his counsel, albeit without much elaboration. He also believed, based upon the opinion of a social worker who had worked

with Carter and not upon his own clinical examination, that Carter had accepted that he would be executed if he lost his appeals.

Approximately two years later, Stinson provided the court with an updated description of Carter's condition. Stinson opined that Carter's condition had become "progressively worse, and despite treatment, he appears to have significant psychosis and functional limitations even when he is at his expected baseline." Based upon the evidence presented at the hearing and Stinson's update, the court concluded that Carter was incompetent to understand his current position or to assist his habeas counsel. As a result, the court dismissed the habeas petition without prejudice and prospectively tolled the AEDPA statute of limitations until Carter regained competency.

II. DISCUSSION

A. The Right to Competence in the Habeas Context

Federal habeas petitioners facing the death penalty for state criminal convictions do not enjoy a constitutional right to competence. However, the Supreme Court held long ago that they do have a statutory right to competence in certain situations. In *Rees v. Peyton*, 384 U.S. 312, 313-14 (1966), a habeas petitioner facing death row petitioned the Court for a writ of certiorari, but subsequently "directed his counsel to withdraw the petition and forgo any further legal proceedings." To the Court, "[w]hether or not [the defendant] shall be allowed in these circumstances to withdraw his certiorari

petition is a question which it is ultimately the responsibility of this Court to determine, in the resolution of which Rees' mental competence is of prime importance." *Id.* at 313. The Court ordered the district court to "make a judicial determination as to Rees' mental competence and render a report on the matter" in order to "aid . . . the proper exercise of th[e] Court's certiorari jurisdiction." *Id.* at 313-14. To accomplish this goal, the Court directed the district court to apply 18 U.S.C. §§ 4244-4245, which has been recodified as 18 U.S.C. § 4241. *Id.* at 314.

Section 4241 states that a district court may hold a competency hearing "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is *unable to understand the nature and consequences of the proceedings* against him or to *assist properly in his defense.*" 18 U.S.C. § 4241 (2006) (emphasis added). If, according to this standard, the district court concludes that a defendant is mentally incompetent, the court:

> shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility--
>
> > (1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

> (2) for an additional reasonable period of time until--
>
> > (A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or
> >
> > (B) the pending charges against him are disposed of according to law;
> >
> > whichever is earlier.

Id. § 4241(d). Additionally, section 4241(d) explains that if the defendant's mental condition does not improve, he may be institutionalized for a longer period of time according to 18 U.S.C. §§ 4246, 4248. *Id.*

By applying section 4241 to habeas actions, *Rees* addresses the situation where a habeas petitioner awaiting the death penalty may seek to forego any collateral attacks on his conviction or sentence, and defines a statutory right for the petitioner to be competent enough to (1) understand the nature and consequences of the proceedings against him, and (2) assist properly in his defense.

Furthermore, we have relied on *Rees* and held that federal habeas courts may conduct preliminary hearings to determine "whether there was 'reasonable cause to believe that the defendant may

presently be suffering from a mental disease or defect rendering him mentally incompetent' to waive his right to further appeals." *Harper v. Parker*, 177 F.3d 567, 571 (6th Cir. 1999) (quoting 18 U.S.C. § 4241). A district court's determination whether there was "reasonable cause" is reviewed for abuse of discretion. *Id.* at 571-72.

In *Harper*, a psychiatrist had diagnosed a habeas petitioner as schizophrenic and opined that he was incompetent to assist in his defense. *Id.* at 568. The petitioner's counsel moved for a pre-petition competency hearing because the petitioner wanted to waive all his remaining post-conviction proceedings. *Id.* at 568. We held that the district court properly conducted a section 4241 hearing to determine whether the petitioner was competent to proceed. *Id.* at 571. We also held that the district court did not abuse its discretion in holding that the petitioner was competent to proceed based upon the evidence presented and the petitioner's participation in the hearing. *Id.* at 572.

Rees and *Harper* anticipate any situation where a capital habeas petitioner chooses to forego seeking his habeas relief. They do not cabin the application of section 4241 to only scenarios where a petitioner chooses to terminate an appeal, or begin, pause, or delay one for that matter. Anytime a capital habeas petitioner affirmatively seeks to forego his habeas petition, whether by action or inaction, *Rees* and *Harper* hold that a district court may employ section 4241. Additionally, *Rees* and *Harper* are clear that this is a one-way street. Only the petitioner's indication to forego his appeal may

trigger section 4241's application. The state cannot forcibly activate section 4241.

Based on *Rees* and *Harper*, the district court did not abuse its discretion in conducting a section 4241 competency hearing. Carter had refused to meet with his attorneys to discuss collateral attacks on his conviction, worrying them that he might not pursue his habeas petition. Carter's attorneys also claimed that Carter could not understand the proceedings or assist counsel in his defense. At the hearing, the court heard expert testimony from both parties that Carter suffered from multiple psychological disorders affecting his abilities to relay facts to his counsel and communicate in detail. Carter's experts believed that any discourse that Carter could engage in with his attorneys would be meaningless because of his complete lack of detailed communication. Furthermore, Carter's experts testified that he was confused as to the identity of his counsel and that he believed he would not be executed unless he volunteered; an irreversibly dangerous false belief. While Resnick disagreed and opined that Carter had finally accepted that he would be executed unless he prevailed upon collateral appeal, Resnick did not make this finding himself, opting instead to adopt the non-scientific conclusion of a social worker who did not testify at the hearing.

The district court did not abuse its discretion in conducting a competency hearing. Carter's refusal to meet with his attorneys to discuss collateral attacks on his conviction would have terminated any right to pursue a habeas writ if it extended beyond

the AEDPA statute of limitations. The district court also did not abuse its discretion in finding that there was reasonable cause to believe that Carter was incompetent, and in further finding that he was incompetent to assist his counsel.

B. The Proper Remedy

1. The district court's dismissal without prejudice and prospective tolling of the AEDPA statute of limitations

The district court dismissed Carter's petition without prejudice and prospectively tolled the statute of limitations largely based on the holding in *Hargrove v. Brigano*, 300 F.3d 717 (6th Cir. 2002). In *Hargrove*, a petitioner filed a habeas petition asserting claims that had not been exhausted at the state level. *Id.* at 718. The district court dismissed the petition without prejudice and equitably tolled the AEDPA statute of limitations prospectively upon the condition that the petitioner exhaust his claims at the state level and return to federal court within thirty days. *Id.* The respondent argued that a court cannot prospectively toll a statute of limitations because tolling is an issue that should be presented to a court later in time after the statute has expired. Nevertheless, we affirmed the district court's decision, remarking that the court had basically achieved a stay and abeyance and still ensured that the "case would move forward expeditiously." *Id.* at 721.

However, the decision in *Hargrove* cannot be applied to Carter's case for three reasons. First, it

could potentially toll the AEDPA statute of limitations indefinitely. That result would be quite different than the thirty-day window in *Hargrove* that we noted would still allow the case to be resolved expeditiously. The result would not resemble a stay and abeyance and could prevent either party from ever presenting its case to the district court.

Second, in *Hargrove*, the petitioner had the onus to act in order to preserve his petition, and the respondent had no burden besides defending against the petition. Here, however, the onus would shift to the respondent. An indefinite toll would prevent Bradshaw from defending against the petition unless she continually filed petitions seeking enforcement of the state conviction and sentence.

Finally, the petition in *Hargrove* was tolled so that the petitioner could exhaust his claims at the state level and quickly return to federal court instead of forcing him to file a new petition. This jurisdictional reason is far different from the issue of incompetency.

Furthermore, it does not appear that any case has ever held that the AEDPA statute of limitations may be equitably tolled prospectively because the petitioner was incompetent. The only published authority we have found where equitable tolling was applied in habeas cases because of the petitioner's incompetence is from our sister circuits, and tolling was applied in those cases *retrospectively*. *See Bolarinwa v. Williams*, 593 F.3d 226, 231 (2d Cir. 2010); *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir.

2001) (overruled in part on other grounds by *Carey v. Saffold*, 536 U.S. 214 (2002)); *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999).

Accordingly, it was improper for the district court to dismiss Carter's petition and prospectively toll the AEDPA statute of limitations indefinitely.

2. Next friends

Bradshaw contends that the district court should appoint a next friend who can continue to litigate Carter's petition on his behalf. Generally, next friends proceed in litigation on behalf of a party that cannot seek relief because of incompetence or inaccessibility. *Whitmore v. Arkansas*, 495 U.S. 149, 162 (1990). The federal habeas statute specifically anticipates that a petition may be filed by someone other than the petitioner acting on the petitioner's behalf. 28 U.S.C. § 2242. To that end, we have recognized a district court's ability to appoint a next friend for a habeas petitioner on death row who is incompetent. *See Martiniano ex rel. Reid v. Bell*, 454 F.3d 616, 617 (6th Cir. 2006). However, before appointing a next friend to an incompetent habeas petitioner, a court must find that the next friend is "truly dedicated to the best interests of the person on whose behalf he seeks to litigate." *Whitmore*, 495 U.S. at 163. "[T]he writ of habeas corpus should [not] be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends." *Id.* at 164 (internal quotations and citation omitted). Indeed, it is preferred, if not required, that a next friend "have some significant relationship with the real party in interest." *Id.* Importantly, the next friend must have more than merely "a

generalized interest in constitutional governance." *Id.*

We find these qualifications for a next friend especially significant for Carter's claims of ineffective assistance of counsel. Only Carter knows critical parts of the factual basis for these claims. As the district court noted, Carter alone has evidence of the interactions between him and his trial and appellate attorneys, and that evidence is inaccessible as long as he remains unable to communicate with his habeas attorneys. Really, a next friend could no more than speculate as to the evidence that Carter may know, and Carter "is better positioned than anyone" to provide that evidence in support of his claim. *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 818 (9th Cir. 2003). Therefore, a next friend would be just as unable as Carter to assist Carter's attorneys in this respect. *See id.* (commenting that only the habeas petitioner's "private knowledge" could truly support his ineffective assistance claim because of his "unique position to testify about the extent of his trial counsel's efforts"); *see also Holmes v. Buss*, 506 F.3d 576, 580 (7th Cir. 2007) (noting that, unlike most cases, a habeas petitioner can contribute to his attorney's strategy concerning claims of ineffective assistance and prosecutorial misconduct because he was present for the trial, his habeas counsel was not, and he may retain "a better sense of the alleged misbehavior of the prosecutor and of defense counsel than the trial transcript and other documentation provide").

Where the factual basis for Carter's claims is locked away exclusively in his memory, he faces the

lonely certainty that no friends in this world could *meaningfully* be dedicated to his interests because they lack the benefit of his knowledge. Even Carter's most ardent supporters might be subjectively dedicated to litigating on his behalf, but as long as they lack the facts that are vital to Carter's claims, they cannot be dedicated in the sense necessary for a next friend to stand fully in Carter's place litigating his claims as wholly as he can. It would be inappropriate to appoint a next friend for Carter's ineffective assistance of counsel claims where the next friend would be forced to proceed through this action without the foundational facts that support Carter's claims.

However, we recognize that Carter's other claims might possibly be litigated without his assistance. Just because Carter might be able to contribute assistance to all his claims does not mean that his assistance is essential. The district court must determine whether it can fully and fairly adjudicate Carter's other claims without evidence from Carter. Perhaps some claims require no evidence from Carter whatsoever. Perhaps others could benefit from it, but that evidence could be replicated by, or substituted with, other sources. If the district court determines that Carter's assistance is not essential to the adjudication of these other claims, then the court should appoint a next friend to litigate them.

3. Stay of the proceedings according to section 4241(d)

Instead of dismissing Carter's petition without prejudice and prospectively tolling the AEDPA

statute of limitations, the district court should have followed the path taken in *Rohan*, a similar case that the district court cited. In *Rohan*, 334 F.3d at 819, the Ninth Circuit held that habeas proceedings should be stayed until the petitioner is found to be competent to proceed. Every court has the incidental power to stay proceedings and manage its docket as it sees fit. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Furthermore, federal courts overseeing habeas actions have statutory authority to stay state court proceedings for any matter relating to the habeas proceeding. *McFarland v. Scott*, 512 U.S. 849, 857 (1994) (citing 28 U.S.C. § 2251). Staying Carter's habeas petition would fall in line with section 4241(d) whereby a court may hospitalize incompetent defendants until they are competent to proceed, and we have already applied section 4241(d) to habeas cases. *See Hargrove*, 300 F.3d at 721. Moreover, in *Hargrove*, we favorably likened the temporary prospective tolling of the statue of limitations to a stay and abeyance, hinting at our approval for such a course of action. *Id.* Understandably, the district court may have wished to remove this case from its docket instead of letting it linger, but dismissing the case inconveniences Bradshaw by forcing her to lay aside Ohio's execution of Carter until some unknown time in the future. It also reduces the possibility that Carter's petition will ever be considered by the district court, thus dashing his hopes to establish his entitlement to habeas relief. Staying the proceedings according to section 4241(d) would allow all parties to remain actively involved and the court to monitor Carter's on-going condition.

Accordingly, we amend the district court's judgment. The district court should not have dismissed Carter's habeas petition without prejudice. Instead, Carter's petition should be stayed according to section 4241(d) with respect to his ineffective assistance claims and any other claims that the district court determines essentially require his assistance.

III. CONCLUSION

The district court did not abuse its discretion in holding a pre-petition competency hearing or by concluding that Carter was incompetent. However, dismissing Carter's petition and equitably tolling the AEDPA statute of limitations prospectively was an inappropriate disposition. Rather, with respect to Carter's ineffective assistance claims, the habeas proceedings should be stayed until Carter is competent according to section 4241. The district court must examine the remainder of Carter's claims to determine whether Carter's assistance is essential to their full and fair adjudication. If not, the court should appoint a next friend to litigate those claims. Accordingly, we **AMEND** the district court's judgment and **REMAND** the case to the district court for proceedings in accordance with this opinion.

DISSENT

ROGERS, J., dissenting. Today the court allows habeas petitioners to prevent States from enforcing their judgments, potentially forever, on the grounds of a nonexistent right to competency in

habeas proceedings. The asserted right has no basis in the Constitution or federal statutes. Civil suits can be brought by lawyers representing mentally incompetent plaintiffs, and habeas cases are no different. Nor are capital cases different in this respect.

First of all, the Constitution, in a point conceded by the majority and all but admitted by Carter's counsel during oral argument, does not provide a right to competency in habeas proceedings. As the Supreme Court explained in *United States v. MacCollom*, 426 U.S. 317, 323 (1976), due process "certainly does not establish any right to collaterally attack a final judgment of conviction." Moreover, the Court held in *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), that there is no constitutional right to counsel for habeas proceedings. If Carter has no constitutional right to a habeas proceeding in the first place, and has no constitutional right to counsel at that proceeding, he logically cannot have the right to be competent so as to communicate with and/or assist counsel during his habeas proceeding. This conclusion is buttressed by *Whitmore v. Arkansas*, 495 U.S. 149, 162-64 (1990), in which the Supreme Court explicitly recognized that a "next friend" can be appointed to initiate and pursue claims on behalf of a habeas petitioner who is mentally incapacitated. If the law permits a next friend to be appointed in order to prosecute the claims of an incompetent habeas petitioner, it cannot also require that a petitioner's habeas proceeding be indefinitely stayed if a court deems the petitioner incompetent.

This case does not involve the separate right of a condemned prisoner to be competent at the time of execution. *See Ford v. Wainwright*, 477 U.S. 399 (1986). That right has to do with the nature of the punishment, and little to do with whether a habeas petition can proceed in order to determine whether the petitioner has been constitutionally convicted.

This case also does not involve the constitutional right to competency during the trial itself. *See e.g., Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). There is a world of difference between trial and collateral attack. Assisting counsel in one's defense at trial is one thing, where the central issue is whether or not the defendant is guilty, and where counsel is constitutionally required. Assisting one's counsel in a habeas petition is another thing, where the central issue is whether the defendant's constitutional rights were violated, and due process does not even require that counsel be provided.

The Constitution thus does not provide that capital habeas petitions be stayed as long as the petitioner is not competent.

There is also no statutory basis for such a conclusion. *Rees v. Peyton* (*Rees I*), 384 U.S. 312 (1966), cited by the majority, cannot be read to extend a statutory right to competency to the circumstances of the instant case. In *Rees*, the district court rejected a death row inmate's habeas petition, the court of appeals affirmed, and the inmate's counsel then filed a petition for certiorari with the Supreme Court. *Id.* at 312-13. Soon after, the inmate directed his counsel to withdraw his petition for certiorari. *Id.* at 313. The Court ordered

the district court to conduct a competency determination of the inmate and retained jurisdiction of the certiorari petition pending the results of the hearing. *Id.* at 314. Following a hearing in which the district court found the inmate incompetent, the Supreme Court issued a summary order stating, "This case is held without action on the petition until further order of the Court." *Rees v. Peyton* (*Rees II*), 386 U.S. 989 (1967). This court also applied *Rees* in *Harper v. Parker*, 177 F.3d 567, 571 (6th Cir. 1999), where we held that district courts may conduct preliminary hearings to determine "whether there was 'reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent' to waive his right to further appeals." *Id.* (quoting 18 U.S.C. § 4241).

Thus, *Rees* and *Harper* plausibly stand for the proposition that habeas petitioners must be competent in order to *terminate* a habeas proceeding. They do not stand for the very different proposition that habeas petitioners must be competent to *assist counsel in the prosecution* of their habeas petition. The distinction is crucial. When a habeas petitioner seeks to withdraw his habeas petition, he is choosing to end what is likely to be his only chance at reversing his conviction and regaining his freedom. This is a decision inherently to be made by the petitioner, and not while the petitioner is incompetent to do so. When a habeas petitioner files his petition and then becomes incompetent to assist his counsel in prosecuting it, however, there is no comparable client decision to be made.

Stated differently, the *Rees* precedent can be read to create an assumption that a habeas challenge to a death penalty will go forward unless the petitioner competently terminates it. Such an assumption cannot logically require that the habeas proceeding will *not* go on—or indeed that it will be resolved in petitioner's favor—merely because the petitioner is not competent to terminate it.

The statute referred to by the Supreme Court in *Rees*, 18 U.S.C. § 4241, provides for competency hearings for defendants in criminal proceedings, and cannot be read to extend to post-conviction proceedings. The Supreme Court took the standard from that statute and adopted it for the purpose of determining whether the habeas petitioner in *Rees* was competent to terminate the habeas proceedings. The Court's adoption of the statutory standard for one required inquiry (competency to terminate proceedings) does not logically imply that another inquiry (competency to assist habeas counsel) needs to be made in the first place. Notably, the Ninth Circuit, in its lengthy opinion holding that incompetent habeas petitioners are entitled to a stay, does not rely on § 4241 as so providing. *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003).

Instead, the Ninth Circuit's holding is based on a different statute, one upon which the majority in this case wisely declines to rely. In *Rohan*, the district court held a competency hearing for a death row habeas petitioner and concluded that the petitioner was incompetent. *Id.* at 806. Nonetheless, the district court went on to deny the petitioner's request for a stay of his habeas proceedings, holding

that neither the Constitution nor the federal habeas statutes required that the proceedings be stayed, because the appointment of a "next friend" adequately protected the petitioner's interests. *Id.* The Ninth Circuit reversed. The Ninth Circuit interpreted 21 U.S.C. § 848(q)(4)(B) (now recodified as 18 U.S.C. § 3599(a)(2)), which provides for appointed counsel in death penalty habeas proceedings, as implying a right to "meaningful" assistance of counsel, which itself depends on the petitioner's ability to communicate rationally with counsel. *Id.* at 812-13. Hence, concluded the Ninth Circuit, Congress meant (though it never said) that a habeas petitioner has the right to be competent during his habeas proceedings. *Id.* at 813.

But the plain language of the statute provides for no such right, and none is ever mentioned. Instead, Congress provided a detailed list of instructions and specifications governing appointed counsel's qualifications and experience in capital habeas proceedings. *See* 18 U.S.C. § 3599(b)-(e). These provisions in no way speak to the *actual effectiveness* of counsel's performance during a habeas proceeding, they simply prescribe a minimum level of background knowledge for appointed counsel. In particular, they say nothing about the competency of the petitioner.

The *Rohan* court relied in part on the implication of a right to competency from a right to counsel from other contexts, such as the constitutional right to competency at trial. *Rohan*, 334 F.3d at 813. But trial and post-conviction proceedings are different, and in any event the

inference as a statutory matter is directly contradicted by a specific statutory provision. AEDPA forecloses claims on collateral attack for ineffective assistance of habeas counsel: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i); *see Benner v. Coyle*, No. 99-3570, 1999 WL 33453848, at *1 (6th Cir. Nov. 1, 1999). If an underlying right to effective assistance of habeas counsel cannot be implied from 18 U.S.C. § 3599, then the derivative right to be competent in habeas proceedings so as to assist counsel cannot be implied either.

There is in short no legal basis whatsoever for inferring a right to competency of the petitioner in habeas proceedings. It is a right created out of whole cloth.

It is also a right that is anomalous in its very nature. For practical purposes, the right will be asserted by capital petitioners but not by other petitioners. Capital petitioners gain something (delaying execution) from indefinitely delaying habeas proceedings, while the interests of convicts serving prison terms—whether competent or not—will almost always be served by the prompt litigation of habeas petitions, so as to advance the possibility of release. But acceptance of the right in concept might well require that it be applied to noncapital cases, where prosecutors could insist that habeas be indefinitely delayed. One might argue that noncapital defendants may waive the right, but by

hypothesis such defendants are incompetent, and thus might be incapable of waiving the right. So recognition of a right to competency in habeas proceedings means either that prosecutors can for practical purposes insist on indefinite postponement of habeas proceedings where convicts are not competent (a counterintuitive result), or that the difference in punishment—capital vs. noncapital—somehow fundamentally changes the nature of how much a lawyer must have input from the client, such that the right is categorically available only for capital convicts (an anomalous result).

It is also anomalous to have a system in which a civil litigant can go into court and instantly get the relief he seeks merely by showing that he is incompetent. In civil cases in our system, a plaintiff has to show a basis for relief, not merely that he is disabled from making such a showing. While habeas cases deal with criminal convictions, they are at bottom civil cases.

Finally, the very ways in which competency is said to be necessary for habeas petitioners would apply just as strongly to the competency of *witnesses* in habeas proceedings. A key witness in a habeas proceeding—one whose input or testimony might make all the difference—might become incompetent or be unable to testify. But no one would argue that a habeas proceeding therefore could not proceed. The parties just have to do the best that is possible with the witnesses and testimony that are available, subject to the rules of evidence.

These concerns are reflected in the facts of this case. Although the district court found that several

of Carter's habeas claims could potentially benefit from his assistance, at least three of these claims plainly do not require any input from Carter for their successful prosecution. Thus, even recognizing a right to competency does not prevent the district court from resolving the merits of at least these habeas claims. These include Carter's claims that: (1) he was incompetent to stand trial; (2) his trial counsel was ineffective for failing to pursue the issue of his competency; and (3) his appellate counsel was ineffective for not appealing the trial court's failure to ensure that he was competent. As for the first of these three claims, Carter's competency is a question of fact, *see Thompson v. Keohane*, 516 U.S. 99, 111 (1995), and he has the burden of rebutting the presumption that the state court's factual findings were correct, *see* 28 U.S.C. § 2254(e)(1); *McAdoo v. Elo*, 365 F.3d 487, 494 (6th Cir. 2004). Carter's competency claim thus depends entirely on the evidence available to the state trial court. The trial court in this case held two competency hearings before trial and found Carter competent after both. Carter's counsel can, as they have already done in his habeas petition, point out any errors in the trial court's assessment of Carter's competency so as to prove that the state-court decision was contrary to or an unreasonable application of federal law or was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). They can clearly do so without the need for information available only to Carter.

The same is true for the other two claims. As noted, the record for this case already contains extensive evidence concerning Carter's competency.

The record also sufficiently reflects Carter's trial counsel's efforts to prove that he was incompetent and how his appellate counsel handled the competency issue on appeal. No information available only to Carter would alter the merits of these claims for purposes of the habeas standard. Perhaps recognizing this, the majority fashions the particularly anomalous remedy of remanding the case in part, for the district court to identify those claims that do not require Carter's assistance and then to appoint a next friend to litigate those claims on Carter's behalf. This "remedy," however, necessarily has the incongruous effect of staying part of the case indefinitely while allowing another part of the case to go forward, with the scope of the latter part to be determined wholly by the district court. This compounds the hobbling of the State's legitimate interests in finality and execution of its judgments.

Two of the remaining claims identified by the district court—Carter's removal from the trial proceedings and the ineffective assistance of his trial counsel during mitigation—could potentially benefit from Carter's assistance. In the first place, it is questionable whether, under the evidentiary limitations imposed by AEDPA, Carter's counsel could introduce new evidence on habeas review in support of these claims, even if Carter were competent.[1] More fundamentally, however, any

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[1] For the claim concerning Carter's removal from the trial proceedings, Carter first raised this as an instance of ineffective assistance of appellate counsel in his Ohio Rule of

assistance that Carter could give would be conceptually indistinguishable from that of a witness. The assistance, if any, from Carter would be the provision of information that could be used to support the claims. But that is exactly what a witness provides. The incompetency of witnesses does not stop civil proceedings, and it is anomalous that the incompetency of a plaintiff should stop

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Appellate Procedure 26(B) application to reopen his direct appeal. Carter's Rule 26(B) application, however, did not include an affidavit from Carter concerning whether he wanted to be in the courtroom for his trial and sentencing. Under the Ohio Rules, Carter's application to reopen his direct appeal needed to contain a sworn statement of the basis for his claim of ineffective assistance of appellate counsel, any parts of the record available to him, and all supplemental affidavits upon which he relied. Ohio R. App. P. 26(B)(2); *Morgan v. Eads*, 818 N.E.2d 1157, 1159 (Ohio 2004). Ohio courts hold that the failure to support an ineffective-assistance-of-appellate-counsel claim with material outside the record is grounds for dismissal of a Rule 26(B) application. *See State v. Griffie*, 658 N.E.2d 764, 765 (Ohio 1996); *State v. Dillon*, 657 N.E.2d 273, 277 (Ohio 1995). Carter therefore failed to develop the factual basis for his removal-from-trial claim, and the claim does not meet the requirements of 28 U.S.C. § 2254(e)(2) since it is not based on a new constitutional right and does not involve evidence that he was actually innocent. *See* 28 U.S.C. § 2254(e)(2)(A), (B). With respect to his ineffective-assistance-during-mitigation claim, Carter requested an evidentiary hearing when he filed his state post-conviction petition, but he failed to submit any evidentiary documents in support of the claim. *See* Ohio Rev. Code § 2953.21(C); *State v. Jackson*, 413 N.E.2d 819, 822 (Ohio 1980). Hence, Carter also failed to develop the factual basis of this claim, and the claim also is not based on a new constitutional right and does not involve evidence that Carter is actually innocent. *See* 28 U.S.C. § 2254(e)(2)(A), (B).

proceedings entirely because the party cannot act as a witness.

Requiring competency on the part of capital habeas petitioners is not compelled by the right to competency at trial, the right to competency in waiving further habeas proceedings, or the right to be competent at the time of execution. The new "right" is not provided by either the Constitution or any statute. It is instead an anomalous monkey wrench thrown into the capital-litigation process.

The district court's order should be reversed, and the case remanded in full so that the habeas proceeding can go forward on all of Carter's claims.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 3:02CV524
Judge Peter C. Economus

SEAN CARTER,

Petitioner,

v.

MARGARET BRADSHAW, WARDEN,

Respondent.

ORDER OF DISMISSAL
Filed: September 29, 2008

This matter is before the Court upon Petitioner, Sean Carter's ("Carter") Motion for Competency Determination and to Stay Proceedings, (Dkt. #132) ("Motion for Competency Determination"). After conducting an evidentiary hearing and reviewing several experts' reports, the Court finds Carter to be incompetent and therefore unable to litigate grounds for relief one, two, five, and six raised in the petition. Accordingly, the Court **DISMISSES** the instant action **WITHOUT PREJUDICE**. The Court prospectively tolls the statute of limitations set forth in 28 U.S.C. § 2244(d).

I. PROCEDURAL BACKGROUND

Carter was convicted and sentenced to death in a Trumbull County Court of Common Pleas for the aggravated murder, aggravated robbery, and rape of Veader Prince. After exhausting his state court appeals, he initiated the instant federal habeas corpus proceeding on March 19, 2002. Also on that date, Carter filed a Suggestion of Incompetence. (Dkt. #1). Carter obtained permission to depose trial counsel on December 17, 2003. (Dkt. #99). After filing an initial petition and two amended petitions, Carter sought and received permission to obtain psychological and neurological experts to examine him.

He thereafter filed a third amended petition on October 3, 2005, (Dkt. #129), to which the Respondent filed an amended return of writ. (Dkt. #138). In this petition, Carter asserted, *inter alia*, that his right to a fair trial was violated when he was removed from it because of his disruptive behavior. He also contended that defense counsel did not pursue the competency issue diligently and that they failed to investigate and present adequate mitigating evidence during the penalty phase of trial.

Concurrent with the third amended petition, Carter filed a Motion for Competency Determination and to Stay Proceedings. (Dkt. #132). On November 29, 2005, the Court granted the Motion for Competency Determination, staying the proceedings pending a competency determination, and setting a competency hearing date for December 16, 2005. (Dkt. #139). After two continuances, the Court held a competency hearing on May 1, 2006. (Dkt. #169-70). It thereafter issued an Order granting the

parties' joint request for post-hearing briefing. Additionally, it ordered Carter's counsel to arrange for the Respondent's experts to observe Carter's interaction with habeas counsel. (Dkt #171).

Carter filed an Objection with the Court, asserting that permitting the State's experts to observe his interaction with counsel would violate the attorney-client privilege. (Dkt. #173). After the Court denied the Objection, Carter filed a Motion for Certification of Appeal under 28 U.S.C. § 1292(b), asking the Court to stay the habeas proceeding and notifying the Court that it would seek a writ of mandamus if the Court were to deny the Motion. (Dkt. #179). The Court denied the Motion on February 1, 2007. (Dkt. #184).

Carter sought mandamus relief in the Sixth Circuit Court of Appeals from the Court's Order on February 28, 2007. (Dkt. #185). After accepting briefs on this issue, the Sixth Circuit granted Carter mandamus relief on November 5, 2007. (Dkt. #186).

Thereafter, Carter filed a Motion for Records, requesting that the Court permit him to procure from the Ohio Department of Rehabilitation and Correction his medical records produced since the May 1, 2006, evidentiary hearing. (Dkt. #190). The Court granted the motion, allowing both parties to review the records and submit supplemental briefs by September 5, 2008.

II. EVIDENTIARY HEARING & POST-HEARING

As noted above, the Court held an evidentiary hearing regarding Carter's competency to proceed with his habeas litigation on May 1, 2006. On that

date, Carter called Dr. Robert Stinson to testify on his behalf. Dr. Stinson first testified about Carter's childhood and mental health history. He stated that Carter's mother was diagnosed with schizophrenia prior to his birth. Children's Services removed Carter from her custody at age two when he was discovered tied to a couch and suffering from malnutrition.

After being placed in foster care, Carter was adopted. That adoption ended abruptly when Children's Services became aware of verbal and physical abuse in the home. Carter thereafter was adopted by the Carter family. He lived with them until age 16 when he was placed in the custody of the Department of Youth Services. Records from as far back as age two indicate that Carter's intellectual functioning placed him in the mild mental retardation range. By age six, one report indicated that Carter was schizoid-prone and at high risk of becoming detached from reality.

Based on these records and his examinations of Carter, Dr. Stinson diagnosed Carter with schizophrenia, undifferentiated type, continuous course with prominent negative symptoms, as well as depressive disorder not specified, a personality disorder, and substance dependence that is in remission. He stated that Carter experiences hallucinations that lead to problems in perception. The schizophrenia also distorts his inferential thinking. Dr. Stinson concluded that deficits in Carter's behavioral monitoring manifests in poor physical hygiene, spontaneous laughter, and unpredictable agitation.

Most significantly, Dr. Stinson observed, were the disease's affect on his language and communication abilities. When speaking to Carter, Dr. Stinson observed that, "[Carter] lacks spontaneity, lacks elaboration. His discussion is void of detail. He doesn't engage in dialogue and provides a lot of empty responses." (Dkt. #172, at 17).

Dr. Stinson opined that Carter does not have a factual understanding of the proceedings. For example, Dr. Stinson testified, Carter held the false belief that he could not be executed unless he volunteered. Additionally, when Dr. Stinson asked Carter to supply him with the name of one of his habeas attorneys, Carter responded with the name of one of his trial attorneys and Dr. Phillip Resnick, the examining psychiatrist for the State. His prognosis for Carter's return to lucidity was poor. Upon observing that, even with powerful anti-psychotic medication Carter still experienced several symptoms of schizophrenia, Dr. Stinson concluded that Carter likely will continue to experience severe symptoms of schizophrenia unless and/or until a new medication arrives that could more aggressively arrest his disease. Id. at 30.

On cross-examination, the Respondent first queried on what standard Dr. Stinson based his opinion. Dr. Stinson replied that he used the standard set forth in Rohan v. Woodford, 334 F.3d 803 (9th Cir. 2003), when assessing whether Carter understood the nature of the proceedings against him. Specifically, he questioned whether Carter knew he had been sentenced to death, whether he understood he could be executed, whether he understood the appeals process, and whether he

knew who his attorneys were and what their goals were. (Dkt. #172, at 45).

The Respondent also questioned Dr. Stinson about Carter's belief that he could not be executed without volunteering. She queried whether this false belief derived from Carter's being housed near a death-row inmate who previously had waived all further appeals and was thereafter executed. After explaining that this was Carter's only contact with a fellow inmate who was executed, she questioned whether Carter's belief was rational and based on observances he made.

Dr. Stinson replied that Carter's inability to comprehend that he could be executed was referred to in psychological terms as a "fixed false belief," i.e., an inaccurate perception that does not change even after attempts to educate the individual to the contrary. (Dkt. #172, at 74). Consequently, Dr. Stinson determined, Carter would continue to internalize the belief that he could not be executed without volunteering regardless of how many occasions others attempted to dissuade him from this belief. Dr. Stinson concluded that, based in part on this false belief, Carter does not truly understand the adversarial nature of the proceedings. Id. at 89. Although Dr. Stinson conceded on cross-examination that Carter could communicate with his attorneys, he concluded that the severity of his schizophrenia renders him an "unreliable historian," requiring collateral records to corroborate his responses. Id. at 98.

Carter next called Dr. Michael M. Gelbort, a clinical neuropsychologist, to testify. After examining Carter, Dr. Gelbort stated that Carter's

thinking skills are fragmented and distracted, primarily due to his distraction from to internal stimuli. He noted that in instances other than receiving straightforward, concrete information, Carter would have trouble responding. Dr. Gelbort opined that Carter's capacity to learn new information and retain it was poor. When asked whether Carter could assist his attorney, Dr. Gelbort responded as follows:

> Will he be able to provide anything other than a seemingly basic assistance, to be able to consider what you present to him if it's other than very basic questions? While he may do so in many ways, it's not worth a whole lot of time or effort on his attorneys' part because his cognitive capabilities are so limited based on the test results, that what he will produce or give back to you is going to be of limited benefit . . . .
>
> I know from my experience trying to elicit history, he is judged to be a very, very poor historian. Not that he's unwilling, but just simply to ask him questions does not elicit information from him that if he does know, he will recognize as being important or significant or relevant. And there are many times when, because of his poor memory, he doesn't have that information available to him at all, even though you would think that he would.

(Dkt. #172, at 112-13).

The State called the final witness of the hearing, psychiatrist Dr. Phillip Resnick. Dr.

Resnick diagnosed Carter with chronic undifferentiated schizophrenia, substance abuse, and a personality disorder. He noted that at the time he evaluated Carter, he did not appear to be suffering from any delusions. Dr. Resnick assessed Carter's mental prognosis as fair to poor.

During the course of his evaluation, Dr. Resnick testified that Carter was able to converse with him about the specific charges of which he was convicted, the victim, his adopted grandmother, and that he was sentenced to death. Additionally, Carter relayed to Dr. Resnick that if his appeals were not successful, he would receive a lethal injection. (Dkt. #172, at 145). Although Dr. Resnick initially had reservations about whether Carter actually understood that he could be executed without volunteering, he allayed these concerns upon speaking to a social worker who confirmed that, after repeatedly attempting to educate Carter that he could be executed without volunteering, he had retained that information. Accordingly, Dr. Resnick satisfied himself that Carter no longer possessed this false belief.

When the Respondent questioned Dr. Resnick about his ability to assist habeas counsel, he responded that Carter could respond to his attorneys but, "due to his illness, [could] not elaborate fully." Id. at 152. He described Carter's condition as follows:

> So if asked a question, he would give kind of a simple answer, a direct answer. You ask him how many sisters he has. He can give you an answer. But if you ask, would you describe each sister and explain what her

> personality is like, he would give a simple answer like she's nice, and would not be able to elaborate.
>
> So in my view, he meets the minimum standard because he can speak rationally and convey information. But I would defer to the Court as to what is sufficient with respect to elaboration.

(Dkt. #172, at 152). When questioned about Carter's ability to reliably convey relevant information, Dr. Resnick replied, "I think he can convey the basic information, but if you're asking for rich details in his recollection of the trial or his description of family members, his illness does not permit him to give a rich description." Id. at 156. Dr. Resnick concluded that while Carter's disease is chronic, it currently was not in an acute phase.

Attached to his supplemental brief submitted to the Court on June 23, 2008, is Dr. Stinson's updated report regarding Carter's mental condition. Dr. Stinson opined that Carter's mental condition has deteriorated since the evidentiary hearing approximately two and a half years ago. He observed that from November 29, 2007, until December 20, 2007, Carter was transferred to Oakwood Correctional Facility, a psychiatric prison facility, because of his declining mental condition

Upon reviewing the notes from Oakwood, Dr. Stinson observed that Carter continues to experience hallucinations. Moreover, he has been disoriented and unable to comprehend or respond to communications from others. His daily functioning, while previously restricted, also has deteriorated

with extremely poor personal hygiene and lack of consistent sleep habits due to nightly, persistent screaming and laughing. From these records, Dr. Stinson concluded that Carter's condition has become "progressively worse, and despite treatment, he appears to have significant psychosis and functional limitations even when he is at his expected baseline." (Dkt. #194-2, Exh. A, at 20).

III. STANDARD OF REVIEW

In its November 29, 2005 Order granting Carter's request for an evidentiary hearing, the Court adopted the reasoning in Rohan v. Woodford, 334 F.3d 803 (9th Cir. 2003), in concluding that a petitioner has the right to be competent during federal habeas proceedings. (Dkt. #139, at 12). The Court now reviews the Rohan reasoning and holdings as well as subsequent cases in which courts were presented with this issue. As is discussed below, the Court concludes that, while Rohan does not supply the Court with binding precedent, it remains the standard by which the Court should review Carter's competence.

A. Rohan v. Woodford

In Rohan, the Ninth Circuit determined whether a petitioner possessed the right to be competent during federal habeas proceedings by conducting a review of decisional law supporting the right to competence after a criminal trial. In that case, the district court had appointed a "next friend" to file a petition on the petitioner's behalf when he appeared to be unable to do so. The petitioner's "next friend" notified the district court that she was unable to proceed without the benefit of obtaining

information from the petitioner. Although the district court found that the petitioner's mental condition would "impede his attorneys from protecting his rights," Rohan, 334 F.3d at 806, it nevertheless held that the habeas litigation could continue because a petitioner had no right to be competent during habeas proceedings.

The Ninth Circuit disagreed. It noted that in Ford v. Wainwright, 477 U.S. 399 (1986), Justice Powell set forth the standard by which courts could determine whether an insane individual was competent to be executed. He concluded that executions should be barred for individuals who were "unaware of the punishment they are about to suffer and why they are to suffer it." Id. at 422. While Justice Powell's separate opinion in Ford was non-binding dicta, courts subsequently adopted it as the standard. Rohan, 334 F.3d at 809-10).

The Rohan Court also noted the Supreme Court's holding in Rees v. Peyton, 384 U.S. 312 (1966), in which the Supreme Court ordered a competency determination when a petitioner sought to withdraw his habeas appeals. Thus, while the Rohan Court observed that the Supreme Court had never adjudicated on the specific issue of whether a habeas petitioner has the right to be competent during habeas proceedings, it had recognized the right of individuals to be competent even after criminal trials.

The Rohan Court next observed the statutory limitations imposed on a petitioner who attempts to file a second habeas petition. It concluded that if a petitioner were not competent to convey relevant information when presenting the first habeas

petition, he or she would face substantial obstacles in presenting new claims in a second petition based on information a habeas petitioner might later be able to convey upon becoming competent. Finally, the Rohan Court noted Congress's recognition of federal habeas as an important part of a defendant's appeal process by creating a statutory right to counsel during those proceedings. Id. at 813 (citing 21 U.S.C. § 848(q)(4)(B), superceded by 18 U.S.C. § 3599(a)(2)). It held that, implicit in the statutory right to meaningful counsel was a habeas petitioner's right to communicate with counsel. It reasoned that, "if meaningful assistance of counsel is essential to the fair administration of the death penalty and capacity for rational communication is essential to meaningful assistance of counsel, it follows that Congress's mandate cannot be faithfully enforced unless courts ensure that a petitioner is competent." Rohan, 334 F.3d at 813. Upon finding that a petitioner possesses the right to be competent during federal habeas proceedings, the Rohan Court next adopted the competency standard by which habeas courts should review these claims, i.e., whether a petitioner understands his or her position and whether the petitioner can assist habeas counsel. Id. at 819.

The Ninth Circuit focused closely on this second prong of the competency test. It observed that certain claims the petitioner raised in the case required the petitioner to provide counsel with information that he alone possessed. For example, one claim the petitioner raised was that he was incompetent to stand trial. The Ninth Circuit recognized that vital information from the petitioner was necessary to pursue this claim. It opined, "[the

petitioner's] own testimony about his former state of incompetence, for example, would (to the extent credited by the court) support his position. He could also direct counsel to circumstantial evidence of his incompetence at the time." Id. at 818.

The Rohan Court cautioned that habeas courts should not require habeas counsel to state with specificity what information they might require to bolster their claims. It held, "Requiring an incompetent petitioner's counsel to identify precisely what the petitioner would tell him were he able seems more likely to elicit the response, 'Well, if I knew that, I wouldn't have to ask!'" Id. at 818. Accordingly, habeas counsel need only identify specific claims that require a petitioner's personal knowledge for full development.

Finally, not every instance of a habeas petitioner's incompetence would require a halt in the habeas proceedings. The Rohan Court recognized that a petitioner's incompetence may not hinder counsel from presenting a petition that includes claims based solely on evidence contained in the habeas record. Id. at 816. Because the Rohan petitioner had raised claims requiring the petitioner's personal knowledge, however, the Court stayed the habeas proceedings and remanded for the district court to hold a new competency hearing, if necessary. Id. at 819.

B. Post-Rohan Decisions

Since the Rohan decision, no court has reached the issue of whether a petitioner must be competent to litigate in habeas proceedings. Instead, courts have held, on disparate grounds, that the particular

circumstances presented in the case did not require the court to adjudicate on the issue. In several circuit opinions, for example, the courts have presumed, without deciding, that the Rohan standard applies. In those opinions, the courts have found that the petitioner failed to set forth sufficient evidence to support a finding of incompetence. See Clayton v. Roper, 515 F.3d 784, 790 (8th Cir. 2008) (assuming without deciding that Rohan standard applicable but finding petitioner failed to demonstrate incompetence); Holmes v. Buss, 506 F.3d 576, 583 (7th Cir. 2007) (assuming without deciding Rohan's applicability when state declined to challenge it); Mines v. Dretke, 118 Fed. Appx. 806, 813 (5th Cir. 2004) (finding petitioner set forth insufficient evidence to support showing of incompetence regardless of whether Rohan correctly decided).

Most recently, a district court reviewing the competency issue found that, unlike in the Rohan decision, many of the petitioner's claims were based on evidence contained within the habeas record. Gonzalez v. Schriro, No. 99-2015-PHX-SMM, 2008 WL 1836743 (D. Ariz. Apr. 23, 2008). The Gonzalez court then determined that the claims that could conceivably require the petitioner's assistance were unexhausted and therefore unripe for habeas review. Id. at *11. Consequently, the Gonzalez court never reached the competency issue.

Based on the above review, it appears that no court has rejected the Rohan holding outrightly. While the Sixth Circuit has yet to decide the competency issue, it has determined, albeit in an unpublished opinion, that a petitioner must be

competent to waive habeas appeals and submit to execution. In Awkal v. Mitchell, 174 Fed. Appx. 248 (6th Cir. Mar. 8, 2006), the Sixth Circuit held that a habeas court must determine whether a capital habeas petitioner who wished to forego further appeals was competent to do so.

Applying the Supreme Court's holding in Rees v. Peyton, 384 F.3d 312 (1966), the Awkal Court remanded the case to the district court for a determination on whether the petitioner had "'the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.'" Awkal, 174 Fed. Appx. at 249 (quoting Rees, 384 U.S. at 314). Thus, while the Sixth Circuit has not specifically held that a petitioner has the right to be competent to proceed with his or her habeas litigation, it has found the right to be competent when a habeas petitioner chooses not to proceed.

Finally, as the Seventh Circuit has observed, the Rohan holding does not have far-reaching consequences. In Holmes v. Buss, 506 F.3d 576 (7th Cir. 2007), the Court observed that the Rohan holding would not benefit non-capital habeas petitioners because it would only serve to delay the adjudication of their habeas claims indefinitely. Id. at 578. It noted that it could find no non-capital cases where a competency claim had been raised.

Because the Rohan holding remains intact and, if Awkal is any indication, may actually be adopted by the Sixth Circuit, the Court sees no

reason to depart from its earlier conclusion that the Rohan holding is the standard of review here. Accordingly, the Court will subject Carter's claims of incompetence to the Rohan test.

IV. ROHAN ANALYSIS

A. Preliminary Issues

Prior to determining whether Carter is competent pursuant to the Rohan test, the Court first must ascertain whether any claims raised in the petition require Carter's assistance to develop. Upon identifying any such claims, the Court then must determine whether these claims are exhausted and ripe for federal habeas review.

The Rohan Court identified certain types of claims that can benefit from a petitioner's assistance. It observed that the petitioner raised issues of his incompetence during trial and that trial counsel were ineffective for failing to pursue a competency hearing. The court reasoned that claims based on off-the-record communications between the defendant and counsel, such as ineffective assistance of counsel claims, were also subject to development by the petitioner's personal recollections. Rohan, 334 F.3d 803, 818 (9th Cir. 2003).

A review of the amended petition reveals that of Carter's nine grounds for relief, grounds one (incompetence to stand trial and removal from the trial proceedings); two (ineffective assistance of counsel during mitigation); five (ineffective assistance of counsel for failure to pursue competency issue); and six (ineffective assistance of appellate counsel for failure to raise trial counsel's failure to pursue competency issue) potentially could

benefit from Carter's assistance.[1] As Carter asserts in his post-hearing memoranda, he alone is in the position to inform habeas counsel what he actually observed during trial and his recollection of communications with defense counsel regarding his family and social background to develop mitigating evidence.

The Court next must determine whether these claims are exhausted and therefore ripe for federal habeas review. In the amended return of writ, the Respondent does not assert that any of the claims enumerated above are unexhausted. Accordingly, this Court cannot dismiss the competency issue, as did the Gonzalez court, on the grounds that no unexhausted issue requiring the petitioner's assistance is properly before it.[2]

---

[1] Although Carter also asserted in the eighth ground for relief that he is mentally retarded and therefore ineligible for execution, those types of claims, while typically requiring mental evaluations, do not require a habeas petition's lucid assistance for development. See e.g., Stallings v. Bradshaw, No. 5:05-CV-722, slip op. at 90-94 (N.D. Ohio Mar. 31, 2008) (adjudicating Atkins claim based on experts' testimony in state court evidentiary hearing).

[2] While the Respondent asserts that some of the issues listed above are partially procedurally defaulted, that issue does not alter the Court's findings. First, because Carter has not submitted an amended traverse, the Court has no means to determine whether Carter can avail himself to an excuse for failing to comply with the State's procedural rules, i.e., whether he can establish cause and prejudice to excuse any procedural default. Moreover, because the Respondent concedes that some of the claims listed above were properly preserved for this Court's review, the potentially defaulted status of others is of no consequence.

B. Competency Determination

Having determined that Carter raises claims that both require his assistance and are ripe for federal habeas review, the Court must now determine whether Carter currently is competent to litigate those claims as set forth in Rohan. Thus, the Court must determine whether Carter comprehends his current position and whether he is able to assist his attorneys in litigating claims raised in the petition. For the following reasons, the Court finds that Carter is not competent.

The question of whether Carter understands his current position is a close one. At the evidentiary hearing, counsel for both parties questioned the experts extensively on the issue. Both Carter's and the State's experts testified at the hearing that Carter suffers from schizophrenia that impairs his thought processes. (Dkt. #172 at 15;142). One specific example of this impairment that both parties explored was Carter's ability to understand whether he could be executed without volunteering. As noted above, Dr. Stinson opined that Carter's "fixed false belief" that he could not be executed without volunteering would persist. Consequently, he concluded that Carter does not truly understand the adversarial nature of the proceedings. (Dkt. #172, at 89).

Conversely, Dr. Resnick testified that Carter was able to speak with him about the specific charges of which he was convicted, the victim, and that he was sentenced to death. Additionally, Carter relayed to Dr. Resnick that if his appeals were not successful, he would receive a lethal injection. (Dkt. #172, at 145). Although Dr. Resnick initially had

reservations about whether Carter actually understood that he could be executed without volunteering, he allayed these concerns upon speaking to a social worker who confirmed that, after repeatedly attempting to educate Carter that he could be executed without volunteering, he had retained that information. Accordingly, Dr. Resnick satisfied himself that Carter no longer possessed this false belief.

Because of the opposing opinions of the experts, the Court finds the question of whether Carter understands his current position is debatable. If the Court were pressed to issue its opinion based solely on the evidentiary hearing testimony, it would be a difficult decision. Because the Court has before it the updated records indicating that Carter's mental status has deteriorated since the hearing, the Court is inclined to credit Dr. Stinson's conclusion that Carter's mental illness prevents him from truly comprehending the nature of the habeas proceedings.

The Court's decision to find that Carter cannot assist habeas counsel is more clear-cut. Each mental health expert that testified during the hearing found that Carter's illness diminished his ability to communicate with counsel. Dr. Stinson concluded that the severity of Carter's schizophrenia renders him an "unreliable historian," requiring collateral records to corroborate his responses. Id. at 98. Echoing Dr. Stinson's findings, Dr. Gelbort noted that Carter was not uncooperative but that, "simply to ask him questions does not elicit information from him that if he does know, he will recognize as being important or significant or relevant." (Dkt. #172, at 113).

Even the State's expert, Dr. Resnick, conceded that, because of the schizophrenia, Carter does not have the ability to "elaborate." Id. at 152. Dr. Resnick concluded that Carter could be of little assistance in providing information to habeas counsel. While he could provide basic information, Carter could provide no detail. As noted above, Dr. Resnick provided an example of his findings:

> So if asked a question, he would give kind of a simple answer, a direct answer. You ask him how many sisters he has. He can give you an answer. But if you ask, would you describe each sister and explain what her personality is like, he would give a simple answer like she's nice, and would not be able to elaborate.
>
> So in my view, he meets the minimum standard because he can speak rationally and convey information. But I would defer to the Court as to what is sufficient with respect to elaboration.

(Dkt. #172, at 152). While Dr. Resnick found Carter could respond to questions, he acknowledged that Carter's mental disease prevented him from providing counsel with detailed responses.

Significantly, Dr. Resnick conceded during the hearing that Carter could not provide habeas counsel with specific information regarding what occurred during trial or provide habeas counsel with details regarding potential mitigating information to develop an ineffective assistance of counsel for failing to present mitigating evidence claim. When questioned about Carter's ability to reliably convey

relevant information, Dr. Resnick replied, "I think he can covey the basic information, but if you're asking for rich details in his recollection of the trial or his description of family members, his illness does not permit him to give a rich description." Id. at 156.

Carter clearly cannot assist habeas counsel in developing the removal from trial, competency, and ineffective assistance of counsel claims raised in the petition. As is apparent from the experts' testimony, Carter could not reasonably be expected to recall and describe how well he was able to view the trial once he was removed from it. Moreover, he would be unable to elaborate on conversations he had with defense counsel regarding his competency. He also does not have the present capability to judge and express to habeas counsel what mitigating evidence from his social and family background defense counsel should have introduced during the sentencing phase of trial because of his limited capacity to recall and convey the details about any such events. Accordingly, the Court finds that Carter is incompetent to proceed with this federal habeas litigation.

While the Court believes the hearing testimony and subsequent medical records regarding Carter dictate this result, it observes that its finding does not invite a flood-gate of habeas petitioners asserting similar claims of incompetence. As the Seventh Circuit noted in Holmes v. Buss, 506 F.3d 576, 578 (7th Cir. 2007), the Rohan holding would not benefit non-capital habeas petitioners because it would only serve to delay the adjudication of their habeas claims. Additionally, the requirement that capital habeas petitioners must demonstrate that the

claims raised in the petition are properly exhausted and based on evidence outside the record that require the petitioner's assistance to develop would further hinder the filing of these claims. Because of the strict statutory limitations on filing successive habeas petitions, moreover, habeas petitioners seeking to assert their incompetence likely must raise any competency issues in their initial petition. Finally, to obtain a stay in their federal habeas proceedings, future habeas petitioners will have to demonstrate, as Carter does here, that they are incompetent pursuant to the Rohan test. These multiple hurdles are unsurmountable for the vast majority of habeas petitioners.

V. DISPOSITION

Having decided that Carter is incompetent to litigate his federal habeas claims, the Court now must determine the best course to proceed. One option would be to stay this matter until Carter regains competency. Federal habeas courts clearly have the inherent power to stay cases and hold them in abeyance. Int'l Bhd. Of Elec. Workers v. AT & T Network Sys., 879 F.2d 864 (Table), at *8 (6th Cir. July 17, 1989)(citing Landis v. N. Am. Co., 299 U.S. 248, 255 (1936)). In Rhines v. Weber, -- U.S. -- , 125 S.Ct. 1528 (2005), the United States Supreme Court held that the better course for a habeas court to choose when confronted with a "mixed" petition of exhausted and unexhausted claims is to stay the case, rather than dismiss it, and permit the petitioner to return to state court. Id. at 1535.

The Sixth Circuit also has stayed a capital habeas corpus case so that the petitioner could return to state court to determine whether he is

mentally retarded under the holding in Atkins v. Virginia, 536 U.S. 304 (2002). Hill v. Anderson, 300 F.3d 679 (6th Cir. 2002). In that case, the Court found that, because the state of Ohio had not conceded that the petitioner was mentally retarded, a factual dispute existed with respect to the petitioner's ability to rely upon Atkins in his effort to avoid the death penalty. The Sixth Circuit held that "Ohio should have the opportunity to develop its own procedures for determining whether a particular claimant is retarded and ineligible for death." Id. at 682.

While the Hill decision to hold the case in abeyance provides this Court with some guidance as to what options a federal habeas court may utilize when faced with an incompetent petitioner, it is by no means dispositive of this issue. In fact, because it deals only with exhaustion rather than incompetency, the Hill Court is silent regarding any consideration of the length of time an action might remain pending on the district court's docket if a habeas petitioner cannot be restored to competency.

While the Sixth Circuit suggested one course of action in Hill, it has approved alternative approaches as well. In Hargrove v. Brigano, 300 F.3d 717 (6th Cir. 2002), the Sixth Circuit affirmed a district court's decision to dismiss a mixed petition accompanied by an order prospectively tolling the statute of limitations under 28 U.S.C. § 2244(d).

In that case, the Sixth Circuit held that the district court's decision to prospectively toll the statute of limitations was reasonable, particularly in light of the fact that the court's decision to equitably toll the statute of limitations was premised on the

petitioner's expeditious filing in state court and anticipated timely return to federal court. Id. at 720. Thus, the Hargrove Court has provided district courts another option to prevent habeas petitioners from incurring prejudice in their attempts to exhaust state remedies. Since the Hargrove decision, courts have recognized the use of prospective equitably tolling of the statute of limitations to safeguard a petitioner's federal habeas claims. See Griffin v. Rogers, 399 F.3d 626, 635 (6th Cir. 2005) (observing that the Hargrove holding "permits a re-filing [of a habeas petition] that would have been available had the case been conditionally stayed rather than dismissed."); Smith v. Bell, No. 07-CV-10749, 2008 WL 251890 (E.D. Mich. Jan. 29, 2008) (prospectively tolling § 2244(d) to permit habeas petitioner to exhaust claims in state court).

The Sixth Circuit also has determined that once exhaustion has occurred, any petition filed thereafter cannot be deemed a second or successive petition under 28 U.S.C. § 2244(b). In Carlson v. Pitcher, 137 F.3d 416 (6th Cir. 1998), the Sixth Circuit held that a petitioner whose federal habeas petition initially was dismissed without prejudice to exhaust state remedies can return to federal court after state exhaustion without fear that the second federal habeas petition will be construed as a successive one. Noting that all other circuits deciding this issue have held similarly, the Court found that, if the district court dismisses solely for exhaustion purposes, then no federal court has rendered a decision on the merits. Id. at 419. Consequently, the Sixth Circuit adopted the findings of other circuit courts, holding that the second petition is not a successive one, but rather "[i]t is one

challenge with multiple stages . . . ." Id. (quoting Benton v. Washington, 106 F.3d 162, 164 (7th Cir. 1996)).

While the Sixth Circuit has yet to prospectively toll the statute of limitations on grounds of incompetency, the Ninth Circuit has utilized this practice, albeit under different circumstances. In Calderon v. U. S. District Court (Kelly V), 163 F.3d 530 (9th Cir. 1998), overruled on other grounds by Woodford v. Garceau, 538 U.S. 202 (2003), the Ninth Circuit held that a prisoner's incompetence is grounds to equitably toll the statute of limitations. There, the petitioner sought to file an untimely habeas petition. The Ninth Circuit tolled the one-year limitations provision finding, "[w]hen a putative habeas petitioner's mental competency is at issue, and the record discloses a genuine basis for concern, it is appropriate to toll the AEDPA's time bar until a reasonable time period after the district court makes a competency determination." Id. at 541 (citations omitted).

Although the Ninth Circuit was presented with the circumstance of a petitioner who sought a tolling of the statute prior to the filing of the petition, its authority lends support to this Court's conclusion that it must dismiss this matter without prejudice and prospectively toll the statute of limitations. Unlike the exhaustion cases outlined above, Carter's absence from federal court could prove indefinite. As Dr. Stinson concluded, Carter's prognosis is poor because of his limited response to anti-psychotic medication. He opined that Carter likely will continue to experience sever symptoms of

schizophrenia until a new medication arrives that could control his disease. (Dkt. #172, at 30).

Because of the potentially lengthy time that may transpire until Carter can be restored to competency, the Court finds the better course for it to take is to dismiss the matter without prejudice and prospectively toll the statute of limitations under the authority of Hargrove. This outcome permits Carter to preserve the right to an adjudication on the merits of his federal habeas claims while considering the length of time this claim might remain pending on the district court's docket while Carter is restored to competency.[3]

Finally, while the Court understands that its decision today may have the effect of indefinitely staying Carter's execution, it notes that, the Supreme Court has accepted such a result in instances where a petitioner's mental capabilities are at issue. Atkins v. Virginia, 536 U.S. 304 (2002);

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[3] Although finding Brigano's authority persuasive in this matter, the Court acknowledges that in a recent opinion, it refrained from extending its application. Bozsik v. Bagley, No. 1:03-CV-1625, 2008 WL 4191141 (N. D. Ohio Sept. 8, 2008). The Bozsik case, however, is easily distinguishable. There, another judge on this Court had dismissed a habeas petition without prospectively tolling the statute of limitations. While his claims were still pending in state court, the petitioner returned to federal court, seeking assurances pursuant to the Hargrove holding that he could re-file the petition at a later date. The Court held that such a motion was premature. Id. at *6. Thus, the Court's decision not to extend the Hargrove holding to Bozsik was based on the premature filing of the motion to reinstate the habeas petition, an issue which is obviously different from what the Court encounters here.

Ford v. Wainwright, 477 U.S. 399 (1986). The Court also recognizes its decision affects the Respondent's ability to promptly enforce its criminal judgments. Because the Supreme Court has countenanced this result regarding a petitioner's ability to be executed, the Court's sees no significant departure from that precedent by applying it earlier in the capital appeals process.

VI. CONCLUSION

For the foregoing reasons, the Court **DISMISSES WITHOUT PREJUDICE** the instant matter. In so doing, it prospectively tolls the one-year statute of limitations set forth in 28 U.S.C. § 2244(d), pursuant to the authority of Hargrove v. Brigano, 300 F.3d 717 (6th Cir. 2002), until such time as the Petitioner, Sean Carter, is competent to proceed with his federal habeas litigation.[4]

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[4] If the State were to conclude that Carter's competence is restored at any point in the future, it would not have to wait for Carter to re-file a habeas petition to proceed. With no litigation pending in either state or federal court, the State can move the Ohio Supreme Court to set a date for Carter's execution. If that circumstance were to occur, Carter would then be subject to the holding in Ford and the competency test attendant thereto. If the state courts were to adjudicate Carter competent, he could then return to federal court in pursuit of habeas relief. Thus, the State has the opportunity to enforce its judgment should it believe Carter has been restored to competency and Carter also has the opportunity to litigate his federal habeas claims.

IT IS SO ORDERED.

s/Peter C. Economus – 9/29/08
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 3:02CV524
Judge Peter C. Economus

SEAN CARTER,

Petitioner,

v.

MARGARET BRADSHAW, WARDEN,

Respondent.

JUDGMENT ENTRY
Filed: September 29, 2008

For the reasons set forth in this Court's Order of Dismissal issued September 29, 2008, the Court dismisses this matter without prejudice and without a decision on the merits. The Court prospectively tolls the statute of limitations set forth in 28 U.S.C. § 2244(d). The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal in forma pauperis would not be frivolous and can be taken in good faith.

IT IS SO ORDERED.

s/Peter C. Economus – 9/29/08
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

OPPOSITION BRIEF

No. 11-218

IN THE

Supreme Court of the United States

TERRY TIBBALS, WARDEN,

Petitioner,

v.

SEAN CARTER,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Did the Sixth Circuit err in staying the adjudication of a capital habeas petitioner's ineffective assistance of counsel claims where experts agreed and the court found that (1) the petitioner is incompetent and (2) allowing those claims to proceed would be equivalent to allowing the petitioner to withdraw those claims?

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INTRODUCTION

The courts below found and the experts for both parties agreed that the federal habeas petitioner, Sean Carter, suffers from mental illnesses, rendering him incompetent and unable to communicate information that is essential to his habeas counsel presenting his ineffective assistance of counsel claims. The court of appeals determined that Carter's incompetence so undermined his ability to pursue those claims that requiring him to adjudicate them now would be equivalent to him withdrawing those portions of his petition. It therefore stayed the habeas proceedings as to those claims and remanded the case so that the district court could adjudicate Carter's other claims. This fact-bound judgment is consistent with the holdings of the courts of appeals and this Court and with the petition's characterization of the law. It does not warrant review.

STATEMENT

Sean Carter was convicted and sentenced to death under Ohio law. In his state habeas proceedings, he exhausted claims that his trial counsel was ineffective for failing to demonstrate his incompetence to stand trial and develop mitigation evidence. Pet. App. 43a. Carter's counsel raised those same claims in his federal habeas petition, which also alleged that Carter was incompetent and asked the court to stay the federal habeas proceedings. *Id.* at 28a, 42a-43a.

The district court held a competency hearing. The State's only witness, Dr. Phillip Resnick, testified that Carter suffered from schizophrenia and personality disorder. *Id.* at 34a. As a result, the State's expert testified, Carter could respond to

direct questions with "simple answer[s]" but could not elaborate on those answers. *Id.* at 46a. Accordingly, "Dr. Resnick concluded that Carter could be of little assistance in providing information to habeas counsel." *Id.* In particular, "Carter could not provide habeas counsel with specific information" necessary to present his ineffective assistance of counsel claims to the federal courts. *Id.*

Carter's experts testified similarly. Dr. Michael Gelbort stated that other than providing "straightforward, concrete information, Carter would have trouble responding" to questions. *Id.* at 33a. Dr. Robert Stinson testified that, as a result of his mental illnesses, Carter did not "engage in dialogue," "provide[d] a lot of empty responses," and "lack[ed]" the ability to "elaborat[e]." *Id.* at 31a. Dr. Stinson later provided an updated report on Carter's condition, explaining that since his initial evaluation of Carter, Carter's condition had "deteriorated." *Id.* at 35a. In fact, for part of the intervening period, prison officials had transferred Carter to a state psychiatric prison facility "because of his declining mental condition." *Id.* Notes provided by that facility indicated that Carter was "disoriented and unable to comprehend or respond to communications from others." *Id.*

In light of the consistent testimony of both parties' experts, the district court found Carter incompetent. *Id.* at 44a. It also found that "Carter clearly cannot assist habeas counsel in developing" his ineffective assistance of counsel claims. *Id.* at 47a. Therefore, it dismissed Carter's habeas petition and tolled the statute of limitations for re-filing. *Id.* at 53a.

The Sixth Circuit, in a 2-to-1 panel decision, amended the judgment and remanded. The court of appeals explained that "[f]ederal habeas petitioners facing the death penalty for state criminal convictions do not enjoy a constitutional right to competence." Pet. App. 4a. Indeed, it cited binding circuit precedent establishing that a "next friend" may be appointed to represent the interests of an incompetent habeas petitioner in federal habeas proceedings. *Id.* at 11a. (citing *Martiniano ex rel. Reid v. Bell*, 454 F.3d 616, 617 (6th Cir. 2006)). Nonetheless, relying on *Rees v. Peyton*, 384 U.S. 312 (1966), the court stated that capital habeas petitioners have a "right to competence" when they seek "'to withdraw the petition and forgo any further legal proceedings.'" Pet. App. 4a (quoting *Rees*, 384 U.S. at 313-14).

Accordingly, the court of appeals concluded that the district court did not abuse its discretion in conducting a competency hearing or determining that Carter "was incompetent to assist his counsel." *Id.* at 8-9a. The court of appeals further concluded, however, that the district court erred in dismissing Carter's petition. *Id.* at 9a. The evidence and findings below demonstrated that Carter's incompetence effectively "terminated [his] right to pursue a habeas writ" based on his claims of ineffective assistance of counsel. *Id.* at 8a-11a. Regarding these claims, "Carter alone has evidence" that is "essential" to "assist[ing] [his] attorneys" in understanding the nature of the allegations and developing a "strategy," "and that evidence is inaccessible as long as [Carter] remain[s]" in his present condition. *Id.* at 12a-13a. Because Carter's incompetence would effectively result in him withdrawing those claims, the court held that adjudicating *those* claims would be

improper. *Id.* At the same time, the court reiterated, Carter does not possess a general right to be competent during his habeas proceedings. *Id.* at 13a. Therefore, the district court was required to appoint a "next friend" and adjudicate all claims for which Carter's assistance is not "essential." *Id.*

The court of appeals reinstated the petition, stayed the adjudication of Carter's ineffective assistance of counsel claims, and remanded so that the district court could adjudicate the claims for which Carter's assistance is not "essential." *Id.* at 15a. It further indicated that the district court should "monitor Carter's on-going condition" so that it could litigate the ineffective assistance of counsel claims as expeditiously as possible. *Id.* at 14a.

REASONS FOR DENYING THE WRIT

I. The Decision Below is Narrow and Fact-bound.

The court of appeals rendered a narrow fact-bound decision. It stayed only those claims for which the evidence demonstrated that Carter's assistance is so essential that forcing him to present those claims while he is incompetent would be equivalent to him withdrawing those claims. Further, it indicated that the partial stay would remain in effect only until Carter can meaningfully communicate with his counsel. The court based its decision on the undisputed testimony of both the State and Carter's experts, who agreed that Carter suffers from schizophrenia and personality disorder, and, as a result, is unable to communicate with counsel.

The narrowness of the court of appeals' holding is reinforced by the fact that it reversed the district court's dismissal of the petition and remanded so that the

district court could appoint a "next friend" and adjudicate all of Carter's claims for which his assistance is not essential. Moreover, the court of appeals instructed the district court to monitor Carter's condition to ensure that the parties litigate Carter's stayed claims as soon as feasible.

This fact-specific decision has no broad implications for the "capital-litigation process." Pet. 20.

II. No Conflict Exists Among the Lower Courts.

In *Rees v. Peyton*, this Court stated:

> Whether or not [the capital habeas petitioner] Rees shall be allowed . . . to withdraw his certiorari petition is a question which it is ultimately the responsibility of this Court to determine, in the resolution of which Rees' mental competence is of prime importance. We have therefore determined that, in aid of the proper exercise of this Court's certiorari jurisdiction, the Federal District Court in which this proceeding commenced should upon due notice to the State and all other interested parties make a judicial determination as to Rees' mental competence and render a report on the matter to us.

384 U.S. 312, 313-14 (1966). The district court judged Rees incompetent and this Court then held the case "without action," *Rees v. Peyton*, 386 U.S. 989 (1967), until Rees died, at which point the Court dismissed the case without opinion, *Rees v. Superintendent of Va. State Penitentiary*, 516 U.S. 802 (1995).

The court below performed a straightforward application of *Rees*. It recognized that it was its responsibility to ensure that Carter was competent before allowing him effectively to withdraw his ineffective assistance of counsel claims. As in *Rees*, it stayed those claims until Carter can provide the necessary assistance.

The Petition characterizes the other circuits' applications of *Rees* in precisely the same way: *Rees* requires federal courts to assure the competence of capital habeas petitioners before allowing them to "abandon further legal proceedings." Pet 13 (quoting *Smith v. Armontrout*, 812 F.2d 1050, 1057 (8th Cir. 1987)) (internal quotation marks omitted). For example, as the petition highlights, the Third Circuit has explained that "*Rees* demands" a capital habeas petitioner "may not" be allowed to withdraw his petition "if [he] is incompetent." Pet. 14 (quoting *Michael v. Horn*, 459 F.3d 411, 420 (3d Cir. 2006)) (internal quotation marks omitted).

The other cases cited in the petition articulate *Rees*'s holding similarly. *Henderson v. Campbell*, 353 F.3d 880, 893, 894 (11th Cir. 2003) ("Language from the Supreme Court's decision in *Rees v. Peyton* has consistently been cited as setting forth the controlling legal standard for assessing the validity of a death row inmate's choice to forego post-conviction review": For the decision to be valid the court must find that the petitioner understands "'he must continue to engage in the review process or be executed.'" (citation omitted) (quoting *Hauser ex. rel. Crawford v. Moore*, 223 F.3d 1316, 1323 (11th Cir. 2000)); *Brewer v. Lewis*, 989 F.2d 1021, 1026 n.4 (9th Cir. 1993) ("The Supreme Court stated the test for determining whether a habeas petitioner is competent to waive his right to federal review of his conviction and sentence in *Rees v. Peyton*: 'whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation . . . .'" (citation omitted) (quoting *Rees*, 384 U.S. 314)); *Rumbaugh v. Procunier*, 753 F.2d 395, 396, 398 (5th Cir. 1985) (explaining that under *Rees*, a

capital habeas petitioner who "resist[ed] the efforts" of others to secure habeas relief on his behalf should be allowed to "forgo further appeals and collateral attack[s] upon his conviction and sentence" only if he is not suffering from a mental disease that "prevent[s] him from making a rational choice" about whether and how to pursue his claims).

At bottom, the petition seeks to fashion a conflict not based on the courts' of appeals articulations of *Rees*, but because this case involves an effective withdrawal rather than an affirmative withdrawal of habeas claims. Pet. 13-17. At the same time, the petition concedes that the Sixth Circuit's binding precedent is "like [that of] its sister circuits." Pet. 15 (citing *Harper v. Parker*, 177 F.3d 567, 571 (6th Cir. 1999)). And it cites no case contrary to the decision below. This fact-specific application of *Rees* does not satisfy any of the Court's criteria for review.

III. The Decision Below is Consistent With this Court's Jurisprudence.

The petition (at 18-20) briefly argues that the decision below is inconsistent with several of this Court's cases. None address the issue presented here.

First, the petition cites *Rhines v. Weber*, 544 U.S. 269 (2005), in which this Court considered whether federal courts may stay consideration of a habeas petition so that the petitioner can exhaust claims in the state courts. *Rhines* did not address whether or when a court should stay proceedings on an incompetent individual's habeas petition, and it held that, under the Antiterrorism and Effective Death Penalty Act, federal courts retain their "ordinar[y]" power to issue stays. *Id.* at 276. *Rhines* is not pertinent here.

Second, the petition suggests an inconsistency with *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), which held "that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 1398. The issue here, however, is not whether the essential information Carter's incompetence prevents him from providing could be used to supplement the record. Instead, the question is whether Carter's undisputed mental illness required the lower court to stay Carter's ineffective assistance of counsel claims, in light of the court of appeals' determination—based in part on the State's own expert—that Carter is incapable of providing the communication essential to the pursuit of those claims.

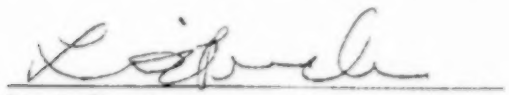
Finally, the petition relies on *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), which address when the state may execute an individual who claims to be incompetent. That issue is not presented here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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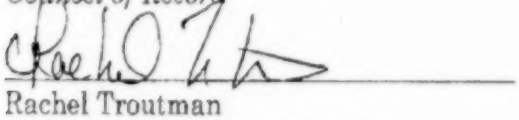

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October 2011

WORD COUNT CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,021 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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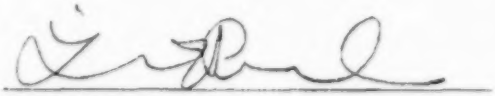

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REPLY BRIEF

No. 11-218

In the Supreme Court of the United States

TERRY TIBBALS, Warden,

Petitioner,

v.

SEAN CARTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY OF THE PETITIONER

The unique facts of this case and Respondent Carter's mental condition are not at issue. The Warden's petition for certiorari raises only discrete questions of law—whether a capital prisoner possesses a "right to competence" under *Rees v. Peyton*, 384 U.S. 312 (1966), and whether that decision permits an indefinite stay of the prisoner's habeas proceeding.

Carter's Opposition does nothing to undermine the Warden's request: The Court has never recognized a "right to competence" in federal habeas proceedings—a point that Carter has repeatedly stressed in this case; the federal appellate courts diverge sharply in their applications of *Rees*; and the Sixth Circuit's decision—permitting an indefinite stay of an incompetent prisoner's habeas case—runs headlong into AEDPA.

Finally, the Sixth Circuit's decision will bring capital habeas litigation to a halt. Now, any Ohio prisoner may invoke *Rees* by "refus[ing] to meet with his attorneys," "relay facts," or "communicate in detail." App. 8a. A district court must then stay all proceedings, authorize multiple psychological exams, conduct a hearing, render a decision on competency, and permit several rounds of appeal. After nine years of such litigation in this case, the district court is still no closer to reviewing the merits of Carter's habeas claims.

The Court issued its cryptic opinion in *Rees* forty-five years ago. Because the Sixth Circuit's novel and sweeping interpretation of that decision threatens Ohio's capital punishment scheme, the Court should grant review and clarify its precedent.

A. This Court has never addressed whether capital prisoners have a "right to competence" in habeas proceedings.

The Sixth Circuit identified "a statutory right for the [habeas] petitioner to be competent enough to (1) understand the nature and consequences of the proceedings against him, and (2) assist properly in his defense." App. 6a. The court and Carter both portray this holding as "a straightforward application of *Rees*." Opp. to Cert. at 5.

They are wrong. *Rees* says nothing of the sort. And in the years after *Rees*, several prisoners have asked this Court to realize the same "right to competence." Each time, the Court refused to consider the question.

For instance, in *Rector v. Bryant*, 501 U.S. 1239 (1991), mental examiners concluded that a capital habeas petitioner "would have considerable difficulty . . . work[ing] in a collaborative, cooperative effort with an attorney" and "he would not be able to recognize or understand facts which might be related to his case." *Id.* at 1240 (Marshall, J., dissenting from denial of certiorari). Despite those limitations, the Court denied his petition for certiorari. *Id.* at 1239.

Twenty years later, another capital petitioner alleged that he suffered "substantial impairments in [his] mental capacity," that he "c[ould] not assist counsel," and that he "c[ould] not communicate accurate information to counsel." Pet'n for Cert., *Bedford v. Collins*, No. 09-8671, at 12-14 (U.S. Jan. 15, 2010). The prisoner invoked his "rights to meaningful representation" under *Rees* and

requested a remand to the district court. *Id.* at 12. Again, the Court denied certiorari without comment. See *Bedford v. Collins*, 130 S. Ct. 2344 (2010).

If *Rees* recognized a "right to competence," then these prisoners were entitled to an indefinite stay of proceedings pending their restoration to competency. The Court's summary denial of their claims supports the opposite proposition: That *Rees* did not address this issue.

In fact, Carter has repeatedly acknowledged the dearth of Supreme Court authority in support of his position. In his initial request for a competency hearing, Carter claimed a "right to competence for all proceedings, including proceedings seeking collateral relief." Mot. for Comp. Det. and to Stay Proceedings, *Carter v. Bradshaw*, No. 3:02-cv-524, at 2 (N.D. Ohio Oct. 3, 2005) (Doc. 132). But he conceded that "[t]he United States Supreme Court has not determined whether such a right exists." *Id.* at 2 n.1. In a later pleading, Carter again admitted that "Supreme Court precedents do not conclusively resolve th[e] issue" of whether "a requirement of rational communication [exists] between Petitioner and his attorney during federal habeas proceedings." Reply to Warden's Mem., *Carter v. Bradshaw*, No. 3:02-cv-524, at 2 (N.D. Ohio Oct. 31, 2005) (Doc. 136).

The federal appellate courts have also noted this lack of guidance. In *Mines v. Dretke*, No. 03-11137, 2004 U.S. App. Lexis 26259 (5th Cir. Dec. 16, 2004), a capital prisoner asserted a "right to communicate with and assist his counsel effectively in a habeas proceeding." *Id.* at *15. The Fifth Circuit observed that "[n]either the Supreme Court nor this court ha[s] determined whether such a right exists." *Id.*

The Ninth Circuit made a similar comment in *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 810 (9th Cir. 2003): Whether "a district court [must] stay habeas proceedings when a petitioner cannot assist counsel because he is incapable of rational communication . . . is an issue the Supreme Court precedents do not conclusively resolve."[1]

No evidence supports the Sixth Circuit's contrary conclusion—that *Rees* "long ago" established a right to competence in federal habeas proceedings. App. 4a.

B. The circuits have diverged on this issue.

Lacking clarification, four circuits apply *Rees* to a narrow category of cases where the prisoner "elects to abandon further legal proceedings." *Smith v. Armontrout*, 812 F.2d 1050, 1057 (8th Cir. 1987). For these courts, the rationale of *Rees* is applied only to the "determination [whether] a petitioner was competent to abandon collateral review of his . . . capital murder conviction and death sentence." *Mata v. Johnson*, 210 F.3d 324, 328 (5th Cir. 2000); accord *Michael v. Horn*, 459 F.3d 411, 420 (3d Cir. 2006); *Henderson v. Haley*, 353 F.3d 880, 893 (11th Cir. 2003).

As Carter recognizes, these cases all involved "an *affirmative withdrawal* of habeas claims." Opp.

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[1] The Ninth Circuit in *Rohan* instead located a "right to competence" in 18 U.S.C. § 3599, which supplies appointed counsel to indigent capital prisoners. (The State of Arizona is seeking review of that decision. See Pet'n for Cert., *Ryan v. Gonzales*, No. 10-930.) The Sixth Circuit did not ground its decision in § 3599, and Carter's Opposition does not rely on *Rohan* as an alternative basis to defend the judgment below.

to Cert. at 7 (emphasis added). After the prisoner expressed a desire to terminate his proceeding, the courts consulted *Rees* to assess his competency to make that choice.

But Carter has not sought to terminate his habeas proceeding. To the contrary, Carter has indicated that he "does not wish to die and wants to avoid being executed." Merit Br. of Appellee, *Carter v. Bradshaw*, No. 08-4377, at 35-36 (6th Cir. June 2, 2009).

The Sixth Circuit is the first court to apply *Rees* to this situation, finding that the decision was "not cabin[ed] . . . to only scenarios where a petitioner chooses to terminate an appeal." App. 7a. Rather, the Sixth Circuit indicated, *Rees* is triggered whenever a prisoner's "psychological disorders affect[] his abilities to relay facts to his counsel and communicate in detail." App. 8a.

What is more, the Sixth Circuit's decision sets up a direct conflict with the Eighth Circuit. After unsuccessfully attempting suicide, the capital prisoner in *Rector v. Clark*, 923 F.2d 570, 571 (8th Cir. 1991), underwent a lobotomy. Due to "organic deficits," doctors concluded that the prisoner "would have considerable difficulty . . . in being able to work in a collaborative, cooperative effort with an attorney," and that "he would not be able to recognize or understand facts which might be related to his case." *Id.* at 572.

The Eighth Circuit rejected this "ability-to-assist-counsel" deficiency as a reason to delay the federal habeas proceeding. *Id.* at 572-73. The court

then evaluated and dismissed the prisoner's habeas claims on their merits. *Id.* at 573.

Simply put, the disagreement among the lower courts is stark. The Eighth Circuit has said that a prisoner's incompetence will not justify suspension of the habeas proceeding. And at least four circuits limit *Rees* to cases where the prisoner "direct[s] his counsel to withdraw his petition . . . and to forgo any further federal habeas proceedings," *Michael*, 459 F.3d at 420. But the Sixth Circuit takes a different view: An expansive "right to competence" exists in post-conviction proceedings under *Rees*, even where the prisoner has not attempted to withdraw his petition. And a district court must stay indefinitely the habeas proceeding if it finds the prisoner to be incompetent.

The Court should grant review and resolve this confusion.

C. The Sixth Circuit's decision to stay indefinitely Carter's habeas proceeding violates AEDPA.

The judgment below warrants review for an additional reason: The Sixth Circuit's stay order violates AEDPA.

Carter asserts, and the Warden agrees, that "federal courts retain their 'ordinary' power to issue stays" in habeas proceedings. Opp. to Cert. at 7 (alteration omitted). But while "AEDPA does not deprive district courts of that authority . . . it does circumscribe their discretion." *Rhines v. Weber*, 544 U.S. 269, 276 (2005). A federal court's decision to stay a habeas proceeding "must . . . be compatible with AEDPA's purposes." *Id.*

In defending the need for an indefinite stay, the Sixth Circuit stressed Carter's present inability to communicate with his attorneys about his habeas petition: "Only Carter knows critical parts of the factual basis for these claims . . . and Carter 'is better positioned than anyone' to provide that evidence." App. 12a (citation omitted). Because "the factual basis for Carter's claims is locked away exclusively in his memory," the Sixth Circuit concluded that "[i]t would be inappropriate . . . to proceed through this action without th[ose] foundational facts." App. 12a-13a.

Carter's Opposition repeats this justification: His habeas proceedings must come to a halt because he is currently "incapable of providing the communication essential to the pursuit of [his] claims." Opp. to Cert. at 8.

This rationale rests on a mistaken premise: It assumes that, but for his mental illness, Carter might be able to identify some yet-to-be-unearthed evidence, information, or fact for this habeas proceeding. That is wrong. Because Carter's habeas claims "w[ere] adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d), "the record under review is limited to . . . *the record before the state court*." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (emphasis added). "[E]vidence later introduced in federal court is irrelevant to § 2254(d)(1) review"; the courts "are barred from considering [it]." *Id.* at 1400, 1411 n.20.

Carter's habeas proceeding therefore turns "on the record that was before the state court." *Id.* at 1400. Any new information that Carter might communicate in the future to his attorneys, were his

condition to improve, would not alter the proceeding's outcome. For that reason, the Sixth Circuit's indefinite stay order—premised on the need to preserve Carter's ability "to provide . . . evidence in support of his habeas claims," App. 12a—violates AEDPA.

D. The Sixth Circuit's decision disrupts Ohio's capital punishment scheme.

Carter dismisses, without discussion, the Warden's remaining arguments for certiorari. The Sixth Circuit's decision radically alters capital habeas litigation in Ohio and elsewhere.

First, the Sixth Circuit's decision effectively displaces *Ford v. Wainwright*, 477 U.S. 399 (1986), as the seminal case on prisoner incompetency.

Justice Powell's controlling opinion in *Ford* condemned "the practice of executing the insane": A State may not proceed with an execution if the prisoner cannot rationally understand "the punishment [he is] about to suffer and why [he is] to suffer it." *Id.* at 418, 422 (Powell, J., concurring). Before adopting this narrow standard, Justice Powell made clear that a prisoner's "[in]ability to make arguments on his own behalf" *was not a basis for halting a capital sentence. Id.* at 419.

The Sixth Circuit held differently in this case: It indicated that a capital habeas petitioner must "be competent enough to . . . assist properly in his defense." App. 6a. And if he falls below that standard, the Sixth Circuit instructed the district court to stay indefinitely the habeas proceeding—and the State's ability to enforce the capital sentence—

"until the petitioner is found to be competent." App. 14a.

This framework is irreconcilable with *Ford*. A prisoner in the Sixth Circuit can now obtain an indefinite stay of his execution based on his "[in]abilities to relay facts to his counsel and communicate in detail," App. 8a—the very deficiencies that Justice Powell *rejected* as justifications to forestall a capital sentence.

For that reason, *Ford* is toppled in the Sixth Circuit. Going forward, capital prisoners in Ohio, Kentucky, and Tennessee will litigate incompetency claims in this new, more permissive forum.[2]

Second, the decision below will give rise to interminable delays in federal habeas proceedings. A prisoner can activate the Sixth Circuit's "right to competence" with ease: In this case, Carter "refused to meet with his attorneys" and his attorneys expressed concern that Carter "could not understand the proceedings or assist counsel." App. 8a. The competency evaluation process is quite protracted: The parties have spent nine years examining Carter's mental capacity, haggling over expert findings, submitting updated reports, and taking two interlocutory appeals to the Sixth Circuit. And that process continues to this day: Consistent with the Sixth Circuit's directive, the district court must determine whether some of Carter's claims can be litigated piecemeal. App. 15a. Disputes over forced

---

[2] Capital prisoners will benefit not just from an expansive definition of "incompetence." As the Warden previously documented, the Sixth Circuit's framework circumvents a number of exhaustion and standing requirements that attach to *Ford* claims. See Pet'n for Cert. at 20.

medication and the procedures by which the district court is "to monitor Carter's on-going condition" are on the horizon. App. 14a.

"All prisoners are at risk of deteriorations in their mental state." *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). And each capital prisoner in the Sixth Circuit will now press a claim of incompetency under *Rees*. At best, he will obtain an indefinite stay of his habeas proceeding. At worst, the collateral litigation will delay his federal habeas proceeding by a decade. Either way, the Sixth Circuit has afforded all capital prisoners a tool by which to "prolong their incarceration and avoid execution of the sentence of death." *Rhines*, 544 U.S. 277-78.

If the Sixth Circuit's reading of *Rees* is correct, then the State of Ohio and its citizens must endure this protracted process before implementing any capital sentence. But all the evidence points to the contrary: The Court has rejected similar incompetency claims, the other circuits have adopted far more restrictive interpretations of *Rees*, and AEDPA undermines the central rationale of the Sixth Circuit's decision. At a minimum, the novelty of the court's holding and its disruption to the capital habeas process warrant this Court's attention.

CONCLUSION

The Court should grant the Warden's petition.

Respectfully submitted,

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November 8, 2011

JOINT APPENDIX

RECORD
AND
BRIEFS

No. 11-218

In the Supreme Court of the United States

TERRY TIBBALS, Warden

Petitioner,

v.

SEAN CARTER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED AUGUST 17, 2011
CERTIORARI GRANTED MARCH 19, 2012

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RELEVANT DOCKET ENTRIES

Sean Carter v. Margaret Bradshaw, Warden
District Court Case No. 02-cv-524 (N.D. Ohio)

DOCKET ENTRY NO. 1

Suggestion of Incompetence. Filed by Sean Carter. IFP Application Filed. (Attachments: # 1 Civil Cover Sheet) (B, R). (Entered: 03/19/2002)

DOCKET ENTRY NO. 6

Ex Parte Motion for order For the Appointment of Mental Health Experts to Determine Whether Sean Carter is Competent to Waive Federal Review of His Conviction and Death Sentence filed by Sean Carter. (Attachments: # 1 Brief in Support)(B, R) (Entered: 03/19/2002)

DOCKET ENTRY NO. 13

Petition under 28 USC 2254 for Writ of Habeas Corpus by a person in state custody (Death Penalty Case). Filed by Sean Carter. (S, R) (Entered: 05/01/2002)

DOCKET ENTRY NO. 39

Amended Petition under 28 USC 2254 for Writ of Habeas Corpus by a person in state custody. Filed by Sean Carter. (Prucha, Linda) (Entered: 01/06/2003)

DOCKET ENTRY NO. 99

Petition under 28 USC 2254 for Writ of Habeas Corpus by a person in state custody amended death penalty petition. Filed by Sean Carter. (Prucha, Linda) (Entered: 04/12/2004)

DOCKET ENTRY NO. 129

Amended Petition under 28 USC 2254 for Writ of Habeas Corpus by a person in state custody filed by Sean Carter. (Prucha, Linda) Modified text 10/12/2005 (C, K A). (Entered: 10/03/2005).

DOCKET ENTRY NO. 132

Motion for Competency Determination and to Stay Proceedings filed by Sean Carter. (Attachments: # 1 Affidavit of Linda Prucha)(Prucha, Linda) Modified text 10/12/2005 (C, K A). (Entered: 10/03/2005)

DOCKET ENTRY NO. 139

Order granting in part and denying in part Petitioner's Motion to Expand(Related Doc # 130) and granting Petitioner's Motion for competency determination and will hold a hearing on 12/16/05 at 1:30 PM in Courtroom 351 before Hon. Peter C. Economus to determine Petitioner's mental capabilities (Related Doc # 132). This case shall be stayed until it determines Petitioner's mental competency. Signed by Judge Peter C. Economus on 11/28/05. (B_R, S) (Entered: 11/29/2005)

DOCKET ENTRY NO. 197

Order: This case is dismissed without prejudice. This tolls the one year statute of limitation until such time as the Petitioner is competent to proceed with his federal habeas litigation. Judge Peter C. Economus on 9/29/08. (BR,S) (Entered: 09/29/2008)

DOCKET ENTRY NO. 199

NOTICE OF APPEAL to the 6th Circuit Court of Appeals from the 197 Order of Dismissal and 198 Judgment Entry of 9/29/08, filed by Margaret Bradshaw. Filing fee paid 10/21/08, receipt# 44660001266 (LeClair, Holly). Modified payment information on 10/21/2008 (S,L). Modified text on 10/22/2008 (H, SP). (Entered: 10/20/2008)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SEAN CARTER,

Petitioner,

v.

MARGARET BRADSHAW, WARDEN

Respondent.

Case No. 3:02CV524
Judge Peter C. Economus
Filed: November 29, 2005

ORDER

This matter is before the Court upon Petitioner, Scan Carter's ("Carter") Motion to Expand or Supplement the Record, (Dkt. # 130) ("Motion to Expand"), and Motion for Competency Determination and to Stay Proceedings, (Dkt. # 132) ("Motion for Competency Determination"). Also before the Court are the Respondent's opposition briefs, (Dkt. #134; 135), and the Petitioner's reply briefs (Dkt. #136; 137). For the following reasons, the Court **GRANTS IN PART AND DENIES IN PART** the Motion to Expand and **GRANTS** the Motion for Competency Determination.

I. FACTUAL BACKGROUND

Carter was convicted and sentenced to death in a Trumbull County Court of Common Pleas for the

aggravated murder, aggravated robbery, and rape of Veader Prince. After exhausting his state court appeals, he initiated the instant federal habeas corpus proceeding on March 19, 2002. Thereafter, Carter filed a petition pursuant to 28 U.S.C. § 2254. (Dkt. #13). On January 6, 2003, he filed an amended petition and a motion to stay the case and hold it in abeyance pending the exhaustion in state court of claims he had raised in the amended petition. (Dkt. #39). The Court granted the motion, requiring Carter to return to federal court after the conclusion of his state court litigation. (Dkt. #45). Upon the conclusion of those proceedings, this matter resumed and the Respondent filed the return of writ on September 16, 2003. (Dkt. #79).

After conducting discovery and expanding the record, Carter sought and received permission to file a second amended petition, (Dkt. #99), to which the Respondent filed an amended return of writ on May 7, 2004. (Dkt. #105). Carter then moved the Court to obtain expert assistance to review his prior medical records and for the appointment of a neuropsychologist. The Court granted the motions. (Dkt. #117). On June 14, 2005, Carter filed a motion to amend the petition, which the Court granted. (Dkt. #123; 127).

Thereafter, Carter filed his third amended petition on October 3, 2005. (Dkt. #129). Concurrent with the third amended petition, Carter filed the instant Motion to Expand and Motion for Competency Determination. In these Motions, Carter requests that the Court expand the habeas record to include additional medical records and affidavits and for the Court to make a competency

determination and stay these proceedings based on Carter's current incompetence. The Respondent partially opposed the Motion to Expand and opposed the Motion for Competency Determination.

II. MOTION TO EXPAND THE RECORD

In his Motion to Expand, Carter asserts that several documents will aid the Court in deciding his first, second, and eighth claims for relief raised in the third amended petition. In these grounds for relief, Carter claims that he was incompetent to stand trial, that he received ineffective assistance of counsel during the mitigation phase because his counsel failed to investigate and present mitigating evidence, and that he cannot be executed because he is currently mentally ill. Carter seeks to expand the record pursuant to Habeas Rule 7 with the following documents:

1. Affidavit and curriculum vita of Bob Stinson, Psy.D.;

2. Affidavit and curriculum vita of Michael M. Gelbort, Ph.D.;

3. Affidavit of Ida Magee;

4. Sanity Report prepared by Steven A. King, M.D., 2/23/1998;

5. Sanity Evaluation prepared by Stanley J. Palumbo, Ph.D., 3/6/1998;

6. Competency Evaluation prepared by Stanley J. Palumbo, Ph.D., 12/16/1997;

7. Psychosocial History prepared by Albert Linder, A.C.S.W./L.I.S.W., 11/6/1997;

8. Letter from Douglas C. Darnall, Ph.D., 11/17/1997;

9. Chemical Dependency Assessment from Portage County Juvenile Court Substance Abuse Awareness Department, 4/19/1994;

10. Department of Youth Services Evaluation, Portage-Geauga County Juvenile Detention Center, 3/27/1995;

11. Department of Rehabilitation and Correction; and Sean Carter's Department of Rehabilitation and Correction medical and mental health files from Mansfield Correctional Institution and Oakwood Correctional Facility.

(Dkt #130, at 1-2).

A. STANDARD OF REVIEW

Rule 7 permits a habeas court to require the production of any documents "relevant to the determination of the merits of the petition." R. Governing Section 2254 Cases 7(a). This rule is expansive, permitting a district court wide latitude in developing the record to ensure a thorough review and prompt disposition of the case. Congress explained the district court's broad authority pursuant to Rule 7 in the Advisory Committee Notes of that rule:

> At any time in the proceedings . . . *either on [the court's] own motion* or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings . . . *before* or in conjunction with the hearing of facts.

Rule 7, R. Governing Section 2254 Cases Advisory Committee Notes (quoting Harris v. Nelson, 394 U.S.

286, 300 (1969))(emphasis in the original). Thus, this Court may, in its discretion, require an expansion of the record at any point in the proceeding if required for disposition.

B. ANALYSIS

Several documents that the Petitioner requests be admitted into the record are documents obtained through Court-ordered discovery. Specifically, Carter's first, second, and eleventh requests to expand the record relate directly to the Court's discovery order. Additionally, the Respondent indicated that she does not oppose the expansion of the record pertaining to these documents. Accordingly, the Court grants Carter's motion to expand the record to include them.

Carter also asks the Court to expand the record to include the affidavit of Ida Magee, who was his foster mother prior to his adoption by the Prince family. He asserts that this affidavit is relevant to his ineffective assistance of counsel during mitigation claim.

Recently, the United States Supreme Court held that a habeas petitioner seeking to expand the record pursuant to Rule 7 must meet the evidentiary hearing standard for introduction of these documents as required in § 2254(e)(2). Holland v. Jackson, 542 U.S. 649 (2004). That statute states:

> (e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court **shall not** hold a hearing on the claim unless the applicant shows that –

> (A) the claim relies on –
>
> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;
> >
> > or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2)(emphasis supplied). The Holland Court held that restrictions that apply to habeas petitioners seeking to factually develop a claim through an evidentiary hearing also "apply *a fortiori* when a prisoner seeks relief based on new evidence *without* an evidentiary hearing." Holland, 542 U.S. at 653 (citations omitted).

Thus, whether a habeas court can grant a petitioner's Rule 7 motion depends largely on whether the petitioner "failed to develop" the factual basis of his claim in state court. The United States Supreme Court defined the "failed to develop" language of § 2254(e)(2) in (Michael) Williams v.

Taylor, 529 U.S.420 (2000). There, the Supreme Court determined that a habeas petitioner has not "failed to develop" his or her claims in state court "unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Id. at 432. The Williams Court determined that Williams's counsel was delinquent in pursuing a police department psychological report of his co-defendant that allegedly provided exculpatory information when trial counsel had viewed references to the report's existence on several occasion. Id. at 438-39. Consequently, the Court held, Williams had "failed to develop" this claim and was barred from a hearing on this issue. *Id.* In one other instance, however, the Court determined that there was no feasible means by which counsel could have developed the factual basis of Williams's claims in state court and, thus, reversed the Fourth Circuit's determination that § 2254(e)(2) barred a hearing for that claim. Id. at 442.

As the Respondent concedes in the amended return of writ, Carter preserved his ineffective assistance of counsel during mitigation claim for federal habeas review by raising during the post-conviction proceedings. He did not, however, present the Magee affidavit to the state courts. Although Carter obtained this affidavit at some point during his state court litigation, he fails to explain why he neglected to present it to the state courts. Thus, because he did not develop the factual basis of this sub-claim in state court, the Court may not now admit it into the record pursuant to the *Holland* holding.

Carter next seeks to expand the record to include two sanity reports prepared by Dr. Steven King and Dr. Stanley Palumbo and a competency evaluation prepared by Dr. Palumbo. These reports were prepared in anticipation of the competency hearings the trial court held prior to trial. These documents, similar to the Magee affidavit, would seemingly be barred from inclusion in the habeas record because they were not part of the state court record.

"The making of new factual allegations in support of a habeas claim, [however], does not by itself lead to the conclusion that it was not fairly presented" to the state courts. Hampton v. Leibach, No. 99 C 5473, 2001 WL 1518533, at *11 (N.D. Ill. Nov. 29, 2001)(citing Picard v. O'Connor, 404 U.S. 270, 277-78 (1971))(further citations omitted). While the petitioner must raise the operative legal and factual bases for a claim to the state courts, mere variations of the same claim that do not go so far as to present a new legal theory or wholly uncharted factual allegations will not preclude a habeas court's finding that exhaustion has occurred. Chambers v. McCaughtry, 264 F.3d 732, 738 (7th Cir. 2001); Caballero v. Keane, 42 F.3d 738, 740-41 (2d Cir. 1994).

Dr. Palumbo testified during the first pre-trial competency hearing on December 26, 1997. The competency report was offered into evidence at that time but, for unknown reasons, failed to become part of the trial court record. Thus, the Court will now expand the record to include it. Although Dr. Palumbo had not yet prepared his final sanity report before the second competency hearing, he referred to

its findings and conclusions during his testimony. Thus, Dr. Palumbo's psychological evaluations and conclusions regarding Carter's mental health were presented to the state court. Similarly, Dr. King prepared his sanity report at the behest of the trial court so that it could obtain a second medical opinion. The trial court's review of this report led it to conduct a second competency hearing. Carter did not "fail to develop" the factual basis of this claim because these reports already were presented to the state court and, in one instance, mirrored the testimony of Dr. Palumbo during one of the competency hearings. Accordingly, the Court will permit Carter to expand the habeas record to include these reports.

Carter also wishes to include in the record a psychosocial history of him prepared by Albert Linder and a letter from Dr. Douglas Darnall. These letters were contained in trial counsel's files. While the Respondent objects to the inclusion of these documents because they are not relevant to the discovery this Court granted, that issue is beside the point. As stated above, to include these documents in the record, the Court need only decide whether Carter was diligent in presenting them in state court and whether they are relevant to the disposition of any claim raised in the petition. Carter asserts that these documents are relevant to deciding his first, second, and eighth claims in the Petition, because Dr. Bob Stinson and Dr. Michael Gelbort reviewed them in preparing their affidavits.

While the Court finds that these documents may be relevant to the aforementioned claims, Carter fails to explain why he did not present them

during any of his state court proceedings, particularly during his post-conviction proceedings. Because he was not diligent in presenting them to the state court, the Court finds that, pursuant to § 2254(e)(2), they cannot be included in the habeas record.

Finally, Carter requests that the Court expand the record to include a chemical dependency assessment from Portage County Juvenile Court and a Department of Youth Services Evaluation. These documents were prepared in 1995 and 1994 respectively. Carter asserts their relevance to this habeas proceeding because Dr. Stinson and Dr. Gelbort relied on them in preparing their affidavits. Once again, however, Carter fails to explain why these documents were not procured and made a part of the state record when raising ineffective assistance of counsel during his state court litigation. Accordingly, the Court is proscribed from including them in the habeas record because Carter does not meet the diligence requirement of § 2254(e)(2). Carter's request to expand the record pursuant to Rule 7 pertaining to these documents is denied.

III. MOTION FOR COMPETENCY DETERMINATION

Carter next moves the Court to make a competency determination and stay these proceedings. He asserts that because he does not now understand the nature and consequences of the habeas proceedings, the Court should stay this case until he becomes competent. Carter's counsel assert that although the Court has ordered them to file the traverse on December 2, 2005, they are unable to "present his claims adequately" because of his

current inability to provide them with assistance. (Dkt. #132, at 9). They rely on the findings of Dr. Stinson and Dr. Gelbort, both of whom have found Carter does not currently have the capacity to understand the nature of the habeas proceedings.

In his Motion, Carter concedes that neither the United States Supreme Court nor the Sixth Circuit Court of Appeals has held that a habeas petitioner must be competent to proceed with his or her habeas litigation. Thus, he relies heavily on a Ninth Circuit opinion in which that court found that such a right exists. Rohan v. Woodford, 334 F.3d 803 (2003). In that case, the Ninth Circuit held that because Congress fortified habeas petitioners with a statutory right to counsel, 21 U.S.C. § 848(q)(4)(B), then it must have implicitly determined that a petitioner has a right to be competent during habeas proceedings because "[c]ounsel's assistance . . . depends in substantial measure on the petitioner's ability to communicate with him." Id. at 813.

Consequently, the court remanded the case, requiring the district court to make a competency determination. The Rohan court held that the district court must ascertain "whether [the petitioner] now has the capacity to understand his position and to communicate rationally with counsel." Id. at 819. It thereafter stayed any further habeas proceedings until the district court found the petitioner to be competent.

In addition to noting that the Rohan holding is the only authority supporting Carter's assertion that he has a right to be competent during habeas proceedings, the Respondent mounts several attacks against the Motion. First, she contends that Carter

already had a competency hearing in state court. She also argues that Carter has not shown that he is unable to assist in his own defense. Rather, she asserts, he merely refuses to aid counsel. Thus, the Respondent claims, Carter is making an independent decision not to assist counsel. Finally, the Respondent observes that Carter's counsel did not appear to need assistance in filing the petition and, thus, questions the bases for habeas counsel's assertion that they are in need of Carter's assistance to file the traverse. Additionally, the Respondent requests that even if the Court holds a competency hearing, it should not stay all proceedings in this case.

The Respondent's first two arguments are without merit. It is well settled that an individual's competency is a fluid, rather than static, state that can fluctuate over time. Thus, the fact that the trial court found Carter to be competent to stand trial is of no consequence here. If this Court were to make an inquiry into Carter's mental state, the trial court's findings would not be relevant. Instead, this inquiry would necessarily include a determination regarding whether Carter is incapable of assisting his counsel or whether he is choosing not to do so. The Respondent's third query, regarding why habeas counsel seemingly did not need Carter's assistance in preparing the petition but now need such aid in preparing the traverse, however, is well-taken. Habeas counsel does not articulate in the Motion why Carter's assistance, which was not necessary to prepare the petition, is required at this juncture.

The Court's decision whether to grant the Motion for Competency Determination turns on

whether it finds that Carter has a right to be competent during habeas proceedings. While the Court recognizes that there is no binding authority requiring it to make a competency determination, it finds the Rohan court's reasoning persuasive. Accordingly, the Court grants Carter's Motion for Competency Determination.

The Court will hold an evidentiary hearing to aid it in deciding the competency issue. Counsel shall present at the hearing any and all evidence that will aid the Court in rendering its competency decision. Carter's counsel shall also be prepared to explain to the Court why it is necessary for them to obtain Carter's assistance to prepare the amended traverse when they expressed no such need for assistance in preparing the amended petition.

IV. CONCLUSION

For the reasons stated above, the Court **GRANTS IN PART and DENIES IN PART** Carter's Motion to Expand. (Dkt #130). Specifically, the Court will expand the habeas record to include the documents in Carter's first, second, fourth, fifth, sixth and eleventh requests. The Court will not expand the record to include the documents in Carter's third, seventh, eighth, ninth, and tenth requests. The Court **GRANTS** the Motion for Competency Determination, (Dkt. #132), and will hold a hearing to determine Carter's mental capabilities on **December 16, 2005 at 1:30 p.m.**. Finally, because the Court finds that Carter must be competent to proceed with his habeas litigation, the Court hereby stays this case until it makes it competency determination.

IT IS SO ORDERED.

s/Peter C. Economus – 11/28/05
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

SEAN CARTER,

Petitioner,

-vs-

CHRISTOPHER YANAI, Warden
Oakwood Correctional Facility

Respondent.

Case No. 3:02CV524
Judge Economus
Magistrate Judge Gallas

Death Penalty Case
NO EXECUTION DATE SCHEDULED
Filed: March 19, 2002

SUGGESTION OF INCOMPETENCE

The Ohio Public Defender hereby gives notice to the Court that Sean Carter may be incompetent to waive his right to federal review of his convictions and death sentence. Mr. Carter is not represented by counsel and has refused all offers to meet with representatives from the Office of the Ohio Public Defender.

This suggestion of incompetence is based upon two pieces of information: Sean Carter is incarcerated at Oakwood Correctional Facility, which is the Ohio prison reserved for inmates with severe mental illnesses. His case worker, Heather Powell,

confirmed that Mr. Carter is mentally ill, but without the appropriate appointment of counsel and signed releases, Ms. Powell cannot provide any more information regarding Mr. Carter's mental health.

A motion for the appointment of counsel and request for expert assistance has been filed along with this notice.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender

s/J. Joseph Bodine, Jr.
J. Joseph Bodine, Jr. - 0042132
Assistant Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
Telephone: (614) 466-5394
Facsimile: (614) 728-3670

Counsel for Petitioner

CERTIFICATE OF SERVICE

This Suggestion of Incompetence is filed ex parte pursuant to 28 U.S.C. § 848(q).

s/J. Joseph Bodine, Jr.
On behalf of Sean Carter

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

SEAN CARTER,

Petitioner,

-vs-

CHRISTOPHER YANAI, Warden
Oakwood Correctional Facility

Respondent.

Case No. 3:02CV524
Judge Economus
Magistrate Judge Gallas

Death Penalty Case
NO EXECUTION DATE SCHEDULED
Filed: March 19, 2002

EX PARTE MOTION FOR THE APPOINTMENT OF MENTAL HEALTH EXPERTS TO DETERMINE WHETHER SEAN CARTER IS COMPETENT TO WAIVE FEDERAL REVIEW OF HIS CONVICTION AND DEATH SENTENCE

The Ohio Public Defender, on behalf of Sean Carter, respectfully requests the appointment of pre-petition psychiatric/psychological assistance to determine if Mr. Carter is competent to proceed with federal review of his conviction and sentence of death. The reasons supporting this request are explained in the accompanying memorandum.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender

s/J. Joseph Bodine, Jr.
J. Joseph Bodine, Jr. - 0042132
Assistant Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
Telephone: (614) 466-5394
Facsimile: (614) 728-3670

Counsel for Petitioner

MEMORANDUM IN SUPPORT OF EX PARTE MOTION FOR THE APPOINTMENT OF MENTAL HEALTH EXPERTS TO DETERMINE WHETHER SEAN CARTER IS COMPETENT TO WAIVE FEDERAL REVIEW OF HIS CONVICTION AND DEATH SENTENCE

The Ohio Public Defender, on behalf of Sean Carter, respectfully requests this Court to appoint psychological experts to determine whether Mr. Carter is competent to waive federal review of his convictions and death sentence. Mr. Carter is currently incarcerated at Oakwood Correctional Facility – the state prison reserved for inmates with severe mental illnesses. Mr. Carter has apparently decided to waive further review of his case and volunteer for execution. He has refused to meet with his counsel during state proceedings and has declined all offers to meet with representatives of the Office of the Ohio Public Defender.

In addition to appointing counsel, the Ohio Public Defender urges this Court to provide Mr. Carter with pre-petition access to psychological experts to determine whether he may waive federal review of his case or whether he need proceed by next friend. This Court is expressly authorized to provide such services ex parte pursuant to 28 U.S.C. § 848. In reviewing § 848, the Supreme Court of the United States expressly held:

> The services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified. Section 848(q)(9) clearly anticipates that capital defense counsel will have been appointed under § 848(q)(4)(B) before the need for such technical assistance arises, since the statue requires "the defendant's attorneys to obtain such services" from the court. § 848(q)(9). In adopting § 848(q)(4)(B), Congress thus established a right to preapplication legal assistance for capital defendants in federal habeas corpus proceedings.

McFarland v. Scott, 512 U.S. 849, 855 (1994).

Because Mr. Carter is incarcerated at a mental health facility and because he has declined all offers to meet with counsel to discuss his case, appointing counsel and providing psychiatric/psychological assistance is the only way to determine how this Court must proceed on the case. Undersigned counsel have no other information to present to this Court regarding Mr. Carter's mental health. Because he does not have

counsel who have been appointed by a court, his clinical and prison records cannot be obtained and reviewed. Therefore, only a suggestion of his incompetence can be made based upon his incarceration at Oakwood Correctional Facility.

The Ohio Public Defender, on behalf of Sean Carter, respectfully requests that appointment of psychiatric/psychological experts to assess Mr. Carter's competence.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender

s/J. Joseph Bodine, Jr.
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8 East Long Street, 11th Floor
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Facsimile: (614) 728-3670

Counsel for Petitioner

CERTIFICATE OF SERVICE

This motion is being filed ex parte pursuant to 28 U.S.C. § 848(q).

s/J. Joseph Bodine, Jr.
On behalf of Sean Carter

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

SEAN CARTER,

Petitioner,

-vs-

CHRISTOPHER YANAI, Warden
Oakwood Correctional Facility

Respondent.

Case No. 3:02CV524
Judge Economus
Magistrate Judge Gallas

Death Penalty Case
NO EXECUTION DATE SCHEDULED
Filed: July 10, 2002

AFFIDAVIT OF SEAN CARTER

STATE OF OHIO :
: SS:
COUNTY OF RICHLAND :

I, Sean Carter, having been sworn according to law, state as follows:

1) I want my attorneys to represent me in federal court.

2) I want to continue to pursue my appeals.

Further Affiant sayeth naught.

s/Sean Carter
Sean Carter

Sworn to before me and subscribed in my presence, this the 28th day of June, 2002.

s/Christa M. Hohmann, Attorney at Law
Notary Public
My commission has no expiration date
Section 147.03 R.C.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

SEAN CARTER,

Petitioner,

-vs-

CHRISTOPHER YANAI, Warden
Oakwood Correctional Facility

Respondent.

Case No. 3:02CV524
Judge Economus
Magistrate Judge Gallas

Death Penalty Case
NO EXECUTION DATE SCHEDULED
Filed: July 10, 2002

AFFIDAVIT OF CHRISTA M. HOHMANN

STATE OF OHIO :
: SS:
COUNTY OF FRANKLIN:

I, Christa M. Hohmann, having been sworn according to law, state as follows:

1) On June 28, 2002, Linda Prucha and I visited Sean Carter at Mansfield Correctional Institution.

2) At that time, we discussed with Mr. Carter whether or not he wished to pursue his case in federal court with our representation. Mr. Carter stated that he wanted to pursue his case and he agreed to our representation.

3) At that time, we asked Mr. Carter to sign an affidavit attesting to the fact that he wished to proceed with his appeals in federal court and wanted the assistance of his attorneys. Mr. Carter agreed.

4) Although Mr. Carter agreed to sign the affidavit, both Ms. Prucha and I have concerns about Mr. Carter's competency and his ability to understand his federal habeas corpus proceedings.

Further Affiant sayeth naught.

s/Christa M. Hohmann
Christa M. Hohmann

Sworn to before me and subscribed in my presence, this the 9th day of July, 2002.

s/Gloria Govine
Notary Public
My Commission Expires 7-24-2005

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION AT YOUNGSTOWN

SEAN CARTER

Petitioner

vs.

MARGARET BRADSHAW, Warden
Mansfield Correctional Facility

Respondent.

CASE NO. 3:02CV524
District Judge Economus
Magistrate Judge Gallas

DEATH PENALTY CASE
Filed: October 3, 2005

AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

Linda E. Prucha (#0040689)
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Melissa J. Callais (#0077833)
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COUNSEL FOR PETITIONER SEAN CARTER

On January 19, 2005, this Court granted Petitioner's motions for expert assistance to review medical records and for the appointment of a neuropsychologist. (Doc. 117). On August 5, 2005, this Court granted Petitioner's motion for an extension of time to complete expert testing and evaluations, and to file Petitioner's amended petition. (Doc. 127). Petitioner has completed the expert evaluations and now files this Amended Petition.

References to the transcript are indicated by Tr. __; references to affidavits are indicated by __ Aff. __. Concurrently with this petition, Petitioner is filing a Motion to Expand the Record with the affidavits of Dr. Bob Stinson and Dr. Michael Gelbort, the affidavit of Sean Carter's foster mother, Ida Magee, and medical records of Sean Carter obtained from the Department of Rehabilitation and Corrections, as well as other documents omitted from the state court record in this case. These exhibits have been marked with letters of the alphabet. For example, reference to Ex. A references an exhibit submitted in the Motion to Expand the Record.

I. INTRODUCTION

Sean Carter, who was heavily genetically predisposed, developed a severe mental illness that manifested itself very early in his life. Sean's mother suffered from severe schizophrenia, his half uncle had a documented history of schizophrenia and substance abuse, and his half aunt was diagnosed with Schizophrenia Paranoid Type. With at least three biological relatives who had been diagnosed with schizophrenia, his risk of having schizophrenia was significantly higher than the general population.

By the age of two, Sean was described as lacking in spontaneity, being fearful of others, and exhibiting violent behavioral reactions; by the age of four, he was identified as being withdrawn, exhibiting a flat affect, and suffering with anxiety; when he was just six years old, it was documented that he was suspicious of others, affectively unresponsive, withdrawn, depressed, and aloof—sometimes just starring off into space, and perhaps most prophetic of all was the assertion that he was schizoid prone and at risk of losing contact with reality. By the time he was seven and a half years old, serious emotional issues had been clearly identified and documented, as he was again described as withdrawn, confused, and schizoid-prone. When he was 13 years old, Sean was characterized as experiencing childhood depression, it was again clearly noted that he had serious emotional issues, and he was specifically described as being at risk. By the time Sean Carter was 15 years old, others described him as anxious, evasive, and guarded; at the age of 16 he appears to have had his first psychotic episode—he was described as emotionally distant, lacking in trust, uncommunicative, unpredictable and explosive; with memory loss, distant and detached, resistant with hostility, experiencing feelings of persecution, and experiencing hallucinations. (Ex. A, Stinson Aff. 7-8).

During his childhood, Sean was diagnosed with anxiety and childhood depression, and he was said to be schizoid-prone Mental status examinations revealed symptoms consistent with a psychotic disorder. Psychological testing showed that he was experiencing a severe mental illness,

and while it was recommended by mental health professions that he obtain counseling, none was ever sought or obtained on his behalf. (Stinson Aff. 7-8). At the age of 18, Sean committed the instant offense.

II. FACTS

In September of 1997, Sean Carter, who had just recently been released from jail, wanted to stay with his adoptive grandmother, Veader Prince. (State's Ex. 95, Sean Carter Statement at 3). However, after a disagreement between them, Ms. Prince told Sean to leave. In the middle of the night Sean, unable to find any other place to stay, came back into Ms. Prince's home through the window. (Carter Stmt. At 4). Sean called out to Ms. Prince. She became insistent that he leave. (Carter Stmt. at 4-5, 20). An argument turned into a struggle, and Sean stabbed Ms. Prince repeatedly with a knife. (Carter Stmt. at 7, 20). The fatal wound was a deep stab that nicked the aorta. (Tr. 2868, 2879).

After Ms. Prince's death, Sean panicked. He tried to make it appear that Ms. Prince had taken him to the hospital. (Carter Stmt. at 12-15). Sean hid Ms. Prince's body under a pile of clothing in the basement, took money from her purse, and drove away in a Chevrolet Chevette. (Carter Stmt. at 24). The State also presented evidence that Sean Carter's semen was present in Ms. Prince's rectum.

Sean was found by the police of Chippewa Township, Beaver County, Pennsylvania, sleeping in a car in an area known as Morgan's Hill. (Tr. 2294-96). The police eventually identified him, and contacted the Trumbull County Sheriff's Department. Detectives of the Sheriff's Department

drove to Chippewa Township, where they questioned him. Sean gave the officers an inculpatory tape-recorded statement and a videotaped interview. (Tr. 2325, 2333, State's Exs. 92, 93, 94, & 95). He waived extradition and was brought back to Trumbull County, Ohio, where he was tried before a jury, convicted, and sentenced to death.

III. PROCEDURAL HISTORY

The Trumbull County Grand Jury indicated Sean Carter for one count of aggravated murder. Appended to that count were three capital specifications. Sean was also indicted for one count of aggravated burglary, one count of aggravated robbery, and one count of rape. After various pretrial hearings, including two hearings to determine Sean's competence to stand trial, he was tried to a jury.

The jury convicted Sean Carter of aggravated murder and two death specifications, aggravated robbery, rape, and criminal trespass on March 20, 1998. Ohio v. Carter, 734 N.E.2d 345 (Ohio 2000); Ohio v. Carter, 2000 Ohio App. LEXIS 5935 (Dec. 15, 2000). Following a penalty phase hearing, the jury recommended a sentence of death, and the trial court adopted that recommendation on April 2, 1998. Id. The trial court also sentenced Sean to prison-terms for aggravated robbery, rape, and criminal trespass. Immediately thereafter, Sean was placed at Oakwood Correctional Facility where he remained for four years. He is currently incarcerated at Mansfield Correctional Facility.

Sean Carter appealed his case to the Ohio Supreme Court, which affirmed his convictions and

sentence. Ohio v. Carter, 734 N.E.2d 345 (Ohio 2000). He raised the following issues to the Ohio Supreme Court:

I. Failure to allege every element of a crime in the indictment results in a void conviction; and, in a capital case where the death penalty specification is based upon such offense, the death sentence is likewise void.

II. Failure of a trial court to instruct a jury on lesser included offenses, when warranted by the evidence, deprives a capital defendant of the ability to remain free from cruel and unusual punishment, and deprives a capital defendant of due process of law because the failure to instruct on lesser included offenses impermissibly restricts the jury's choice to a finding of guilty on capital murder or acquittal.

III. A criminal defendant is denied his right to a fair trial when the prosecuting attorney impermissibly bolsters witnesses testimony and engages in misconduct and improper argument.

IV. U.S. Cons. amend. XIV and Ohio Const. art. I, sec. 1,2, and 16 require the trial court, when presented with bona fide evidence and good faith claims that a criminal defendant is incompetent to stand trial, to examine all reasonably available evidence.

V. Ineffective assistance of counsel violates the U.S. Const. amend. VI and XIV and Ohio Const. art. I, sec. 1 and 10, and rights to a fair and impartial jury trial and a reliably determined sentence, U.S. Const. amend. V, VI, VIII, and XIV and Ohio Cont. art. I, sec. 5, 9, 10, and 16.

VI. A reviewing court may not compare death sentences only with other death sentences and still follow the constitutional demands for a proportionality review, nor may a reviewing court conduct a meaningful proportionality review without sufficient data on jurors' rationale for choosing a life sentence over the death penalty.

VII. The Ohio capital laws, both as enacted and as interpreted, deny a capital defendant meaningful appellate review, an indispensable ingredient in imposing a death sentence consistent with U.S. Const. amend. VIII and XIV and Ohio Const. art. I, sec, 1, 2, 9, and 16.

VIII. Ohio Const. art. IV, sec. 2(B)(2)(c) and 3(B)(2), as amended, deprives a defendant sentenced to death due process of law, equal protection of the laws, Ohio Const. art. I, sec. 1, 2, and 16; and the exercise of a weight of the evidence review by the Supreme Court of Ohio is not authorized by the Ohio Constitution.

IX. Ohio's death penalty statute is unconstitutional.

X. The preclusion of a mercy instruction prohibits trial juries from recommending life sentences where the aggravating circumstances outweigh the mitigating factors, but the jurors nonetheless conclude that the death sentence is not appropriate; therefore, Ohio's death penalty, with its mandatory death sentences under certain circumstances violates the state and federal constitutions.

XI. The Ohio death penalty law involves an excessive and imprecise use of government power so as to encroach upon the "inalienable" liberties specified in the Ohio Constitution.

XII. Fundamental fairness and due process prohibits executions as a form of punishment.

XIII. The death penalty violates U.S. Const. amend. VIII and XIV and Ohio Const. art. I, sec. 1, 2, 9 and 16 since the methods of execution violate evolving standards of human decency, an integral part of due process.

XIV. The death penalty is inappropriate in this case.

A post-conviction petition was filed on April 13, 1999. The trial court denied the petition without

a hearing on August 30, 1999. The following issues were raised in the post-conviction petition:

1. Trial counsel were ineffective for failing to review the defective indictment.
2. Petitioner was incompetent to stand trial.
3. Prosecutorial misconduct deprived Petitioner of a fair trial.
4. Trial counsel were ineffective at the culpability phase.
5. Trial counsel were ineffective at the penalty phase.
6. Petitioner must be afforded the opportunity to conduct discovery.

The Court of Appeals affirmed that decision. Ohio v. Carter, 2000 Ohio App. LEXIS 5935 (Dec. 15, 2000). The following issues were raised in the Court of Appeals:

1. The trial court erred in denying Petitioner an evidentiary hearing on his petition for post-conviction relief.
2. The trial court erred in applying the doctrine of res judicata.

The Ohio Supreme Court declined to accept jurisdiction on May 2, 2001. Ohio v. Carter, 746 N.E.2d 612 (2001).

On January 15, 2003, Sean Carter filed an application to reopen his direct appeal pursuant to App. R. 26(B) in the Ohio Supreme court, claiming that appellate counsel had failed to raise all

instances of prosecutorial misconduct, had failed to raise all instances of ineffective assistance of counsel, and that the trial court had failed to ensure that Sean was competent throughout trial, and failed to safeguard his right to be present. The Ohio Supreme Court denied the application to reopen on March 19, 2003. State v. Carter, 785 N.E.2d 470 (Ohio 2003).

IV. GROUNDS FOR RELIEF

GROUND FOR RELIEF ONE

Sean Carter was incompetent at both the culpability and penalty phases of his trial. Therefore, his convictions and sentence of death are in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him and to consult with and assist in the preparation of his defense may not be subjected to trial. Drope v. Missiouri, 420 U.S. 162 (1975); Dusky v. United States, 362 U.S. 402 (1960).

Two competency hearings were held prior to Sean Carter's capital trial. On December 26, 1997, the court held a competency hearing in which psychologist Stanley Palumbo testified. Defense counsel contacted Dr. Steven King to do an evaluation of Sean's mental state in relation to his not guilty by reason of insanity plea. As a result of Dr. King's concerns about Sean's competence to stand trial, the trial court held a second competency hearing, on February 26, 1998. Dr. King testified at the second hearing, as did Dr. Palumbo. A third

expert, Dr. Robert Alcorn, also testified at the second competency hearing. Both of these competency hearing were held prior to trial. There was no further competency inquiry during the course of the trial.

The conclusions of the examiners at the time of his trial (i.e. that Sean did not have severe mental illness) were based on grossly inadequate information and a significantly under-developed history. In fact, at the time of his trial, Sean Carter was suffering from a severe mental illness which prevented him from communicating with his attorneys and assisting in his defense.

An accurate and true understanding of Sean's severe mental illness and substance dependence was never completely and adequately presented by the mental health professionals in his case. At times, they presented completely inaccurate information to the trier of fact and at other times they presented only partial information. These failures provided for a distorted, incomplete, and inaccurate understanding of Sean Carter's mental illness and substance abuse as it pertained to the issue of his competence to stand trial. (Ex. A, Stinson Aff. 20-35).

1. Relevant information was not presented to or considered by the trial court.

Albert Linder, a psychiatric social worker to Dr. Darnell (a psychologist) was the first to evaluate Sean Carter after the offenses charged. Linder made numerous references to symptoms of a severe mental illness, with no explanation by subsequent evaluators of how to account for them. Linder's

psychosocial history revealed the following: suspiciousness, paranoia, hypervigilance, disturbed and angry affect, difficulty sleeping, auditory hallucinations, visual hallucinations, and responses that ended abruptly. (Ex. G, Linder Report; Stinson Aff. 21). Linder reported obvious remarks and indications of a severe mental illness that were never followed up upon. Although extensive review of collateral records, third party interviews, and/or an inpatient evaluation would be the standard protocol in such cases, none of these strategies were employed in Sean's case. (Stinson Aff. 22).

Linder concluded that "It is clear this defendant has major psychosocial difficulties." He went on to state, "The possibilities of hallucinations, paranoid thinking, and interrupted thoughts indicate he may be suffering from a major psychiatric disorder. Paranoid thoughts dominate his view of the world." (Linder Report; Stinson Aff. 22).

Dr. Douglas Darnall, a psychologist, concluded in a letter dated 11/17/97, that "Sean Carter is suffering from a mental disorder, which could prove to be mitigating under the present circumstances." (Ex. H, Darnall Letter; Stinson Aff. 22). The conclusions of Linder and Dr. Darnall were never presented to the trial court and were not considered by the experts who testified that Sean Carter was competent to stand trial. Trial counsel's failure to present this evidence constituted ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1986).

2. The evaluations and testimony of Drs. Palumbo and Alcorn were prejudicially flawed.

Dr. Stanley Palumbo, a court ordered evaluator, evaluated Sean Carter on November 25, 1997 and December 3, 1997. In a second evaluation, Dr. Palumbo evaluated Sean again on February 10, 1998 and February 24, 1998. Dr. Palumbo also testified after each of his evaluations. His evaluations and testimony were prejudicially flawed.

For example, Dr. Palumbo never clarified Sean's statement that he (Sean) sometimes gets depressed, which gets him laughing; Dr. Palumbo never followed up on Sean's answer "All the time", after being asked if he wished he were not alive. Similarly, Sean told Dr. Palumbo about a suicide attempt in 1994 and told Dr. Palumbo that he sometimes thought about taking his own life. Dr. Palumbo never asked for more details and did not clarify the suicide potential and motivation (or lack thereof) for a favorable outcome in the legal proceedings. (Stinson Aff. 22-23).

Sean told Dr. Palumbo that he (Sean) experienced auditory hallucinations, noting that he heard voices that sounded like a "ghost" that calls his name, and that while they bother him, he does not allow them to get on his nerves. Sean's description of auditory hallucinations is similar to the descriptions given by individuals who are deemed to have experienced bona fide hallucinations and his minimization of the impact of hallucinations on his functioning is wholly inconsistent with a person who would be malingering. Dr. Palumbo appeared to question the legitimacy of Sean's hallucinations by

saying there was no record of them in earlier information. However, documentation of hallucinations prior to Dr. Palumbo's evaluation was available in multiple sources, including records dating back to when Sean was 16 years old, and from Albert Linder's psychosocial history. (Stinson Aff. 22-23).

Dr. Palumbo failed to adequately consider bizarre and confusing statements made by Sean. Nor did Dr. Palumbo make any contact with corrections officers to evaluate the reality base of the persecutory and paranoid complaints that Sean was making. There was ample evidence that Sean's distrust of his attorneys had its roots in a paranoid and persecutory psychotic belief system. This was never explored fully. (Stinson Aff. 23-24).

Dr. Palumbo did not discuss the severity of Sean's mother's Schizophrenia or the types of symptoms that Sean's mother experienced, which, in fact, paralleled Sean's own symptoms. Nor did Dr. Palumbo appear to be aware that an aunt and uncle of Sean had also been diagnosed with Schizophrenia. Dr. Palumbo also simply discounted the strong evidence of clinical depression and death wish in Sean's case. (Stinson Aff. 26).

Dr. Robert Alcorn also evaluated Sean Carter at the time of trial. Dr. Alcorn failed to consult with jail personnel, thereby failing to learn that Sean was in specialized housing at the jail because he attempted to commit suicide while in the jail, an obvious sign of a severe mental illness. (Stinson Aff. 27).

Dr. Alcorn made statements that were simply inaccurate and were reflective of his cursory and inaccurate history and review of collateral records. For example, Dr. Alcorn reported that Sean never had a second seizure after his early childhood. In fact, the records showed at least two sets of hospital neurological test results that supported the presence of seizures and the diagnosis of a neurological impairment; other records indicated continued seizures beyond those documented through hospitalizations. (Stinson Aff. 27). (See also, Ex. B, Gelbort Aff.)

Dr. Alcorn never made clear the relationship between a severe mental illness and Sean's substance use, abuse, and dependence, which included use of alcohol from an early age, sniffing gasoline extensively, using hallucinogenic drugs, and smoking marijuana dipped in embalming fluid and/or laced with cocaine. (Stinson Aff. 27). Nor did Dr. Alcorn delve into the level of intoxication Sean was experiencing on the day of the offense, even though Sean reportedly had been sniffing gasoline. Dr. Alcorn also reported that he observed Sean to be actively hallucinating, yet dismissed this potentially psychotic phenomenon as not being genuine. (Stinson Aff. 27-28).

Dr. Alcorn acknowledged that Sean's speech and sequential reasoning abilities became disorganized and confusing, but failed to delve deeper or attach appropriate significance to these symptoms. Disorganized and confused thinking are some of the more difficult symptoms of Psychosis to malinger and most individuals who are not psychotic generally do not think to feign such symptoms. Also,

disorganized and confused thinking can have a seriously detrimental effect on one's competence to stand trial. It negatively impacts such crucial areas as providing relevant information to one's attorney, sharing one's version of the offense, tracking the legal proceedings, testifying relevantly and coherently, and understanding and critically evaluating legal advice. (Stinson Aff. 28).

Dr. Alcorn's psychiatric conceptualization of Sean Carter was flawed in many ways. His characterization of Sean as an antisocial personality disregarded Dr. Alcorn's own conjecture that Sean at one point was crying because of the disturbing fact of what he had done to his grandmother. Dr. Alcorn gave a diagnosis of Polysubstance Dependence and Malingering, failing to account for all of Sean's signs and symptoms, and failing to conceptualize Sean psychiatrically and psychologically. Sean's signs and symptoms were consistent with a bona fide severe mental illness; the evidence when gathered and analyzed in its entirety is indicative of a thought disorder—Psychosis. (Stinson Aff. 28-29).

Dr. Alcorn testified that Sean was not able to clearly specify a defense strategy; developing and sharing a defense strategy should be considered one element of one's ability to assist in one's own defense. Dr. Alcorn was not able to explain the obvious discrepancy that existed between Sean stating that he wanted the death penalty on the one hand, and Dr. Alcorn's understanding that Sean's hostility toward his attorneys was attributable to normal bantering between defendants and attorneys when the defendant does not believe the court appointed attorney is doing a good job on the other hand. A

conceptualization that would have made more sense and that would also be consistent with the voluminous historical records that Dr. Alcorn did not review would be that Sean's hostility toward his attorney (and others) was symptomatic of a severe mental illness. (Stinson Aff. 30-31).

The third expert who testified at trial, Dr. King, did believe that Sean Carter was suffering from a psychosis and should be hospitalized for evaluation and treatment. Dr. King evaluated Sean on 2/23/98. Dr. King reviewed some of Sean's records and found that in 1995, at the request of detention center staff, Sean was psychologically evaluated and found to be guarded, experiencing hallucinations, exhibiting unusual mannerisms, presenting as detached and distant, displaying an unusual affect, and appearing distracted at times for no apparent reason. With Dr. King, Sean was restless, he intermittently laughed inappropriately, he was threatening, hostile, and demanding at times; he intermittently sang and recited lyrics at times, and he reported symptoms that were consistent with a psychotic disorder, including auditory hallucinations, visual hallucinations, and a running commentary of his thoughts being broadcast out loud. (Stinson Aff. 32).

Unlike the other evaluators, Dr. King was aware that Sean's attorneys were not able to get a full account of the offense charged from Sean, and that Sean was not fully cooperating with his attorneys. Sean lacked focus, was hostile and expressed homicidal thoughts toward his attorney, was paranoid, and unable to cooperate and defend himself. Dr. King noted Sean's self-defeating

motivation, and that he wanted to be punished by death. Dr. King diagnosed Sean with a Psychotic Disorder. Dr. King recommended that Sean be hospitalized for a comprehensive psychiatric evaluation; the Court did not follow this recommendation. (Stinson Aff. 32-33).

In sum, the competency evaluations were prejudicially flawed, due to the failure to obtain a full history, failure to obtain and review all records, and failure to consult collateral contacts. Nor was Sean referred for a neurological and/or neuropsychological evaluation.

3. Sean Carter's attorneys failed to put additional evidence of incompetence into the record and failed to again raise the issue of competence during trial and at the penalty phase. Nor did the trial court again inquire into Sean's competency after the trial began.

Sean Carter's right to be present at his capital trial was violated by his counsel's failure to raise the issue of his competency during trial, and the trial court's failure to again inquire into his competency to stand trial. Although Sean was absent from most of the proceedings of his capital trial, the trial court failed to conduct any further inquiries into his competency or his ability to be present for his trial.

Before the second competency hearing, the trial court advised Sean that he had a right to be present. (Tr. 555). After opening statements, the trial court again explained to Sean that he had a right to be present. (Tr. 2274). Following Sean's disruptive behavior in the courtroom at the

beginning of trial, he was put in the jury room with a television monitor to view the trial. The judge told counsel to check on him periodically and inform the court. Counsel did in fact do this. But, *at no other point in the trial did the trial court bring Sean back into the courtroom to question him as to his desire to be present, or to put on the record Sean's understanding of the proceedings.* They put him away in a room, conducted his whole trial without him, and sentenced him to death.

At the beginning of trial the court questioned Sean about his desire to be absent from the trial. (Tr. 2273-76). Sean said he wanted to plead guilty and tell his story. (Tr. 2278-78). He stated that his lawyer wasn't a real lawyer and he didn't need him. (Tr. 2279). He also said that he was going to "act up." (Tr. 2279). The court noted on the record that the defendant lost control and jumped around; he was restrained by the deputies. (Tr. 2281). At the request of the defense attorneys, Sean was put in the jury room and provided with electronic means to monitor the proceedings and contact his attorneys. (Tr. 2282-85). His presence for the entire trial was waived by his attorneys. (Tr. 2285). His attorneys did not raise the issue of his competency at this point or for the remainder of the trial. They failed to put on the record any additional information about Sean's competency to proceed. The trial court also failed to again inquire into Sean's competency.

During his deposition for these district court proceedings, Attorney James Lewis described Sean's behavior at the time of trial. Lewis said that he never had a relationship with Sean, and that Sean "didn't try to help himself in any way." (Lewis

Dep. 13). (doc. 101). He said, "You talk to the guy, he doesn't want to talk about anything, he wants to talk about something else." (Lewis Dep. 13). Sean would not answer a question, he'd say "where's my Snickers bar?" He was "totally unresponsive." (Lewis Dep. 14-15). Lewis observed, "his life's on the line, and he's out in Timbuktu" and that "he wouldn't protect himself; he did nothing." (Lewis Dep. 15-16). Lewis also said that Sean turned around during trial "and wanted to kill me." (Lewis Dep. 14).

Lewis said that Sean wasn't asking any questions about the process and didn't answer questions. (Lewis Dep. 22). This was troubling because Sean's family did not want to help him, and his attorneys needed Sean's assistance, particularly for the penalty phase. (Lewis Dep. 24-25). The deposition of Attorney Anthony Consoldane echoes that of Lewis; ". . . it was like pulling to [sic] teeth to get him to answer anything. And I don't think I had any meaningful discussion with him that lasted more than a sentence or two at any time." (Consoldane Dep. 11). (Doc. 102).

When asked if he and Attorney Consoldane brought all of Sean's bizarre behavior to the attention of the court, Lewis replied, "I think Tony [Consoldane] probably, if it's in the record, or whatever, yeah. But the conduct was so—I mean, it was so bad to begin with; we already told the Judge what we told him. The Judge already witnessed what he witnessed." (Lewis Dep. 35). Relying on what the judge witnessed at the beginning of the trial was not sufficient. Unfortunately, the court was not able to witness any of Sean's behavior after the beginning of trial, because Sean was removed to the

jury room, where he stayed for the entire trial. It was incumbent upon trial counsel to continue to put evidence on the record of Sean's bizarre behavior, and inability to aid in his own defense.

The trial court has a continuing duty to ensure that a defendant is competent to stand trial. See Drope v. Missouri, 420 U.S. at 179. The Drope case contains an additional element similar to Sean Carter's case: the defendant was absent for a crucial portion of his trial. The Court noted that absence bears on the case in two ways: the defendant's actions suggested mental instability contemporaneous with the trial, and as a result of his absence the trial judge and defense counsel were not able to observe his demeanor in the context of the trial. Id. at 181.

A defendant has a constitutional right to a hearing at any point when there is sufficient "indicia of incompetence" to alert the court that an inquiry is needed to ensure a fair trial State v. Berry, 650 N.E.2d 433, 439 (Ohio 1995). "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Drope v. Missouri, 420 U.S. at 181. Factors to be considered include supplemental medical reports, specific references by defense counsel to irrational behavior, and the defendant's demeanor during trial. State v. Chapin, 424 N.E.2d 317 (Ohio 1981) (par. 1, syllabus).

A defendant's competence to assist in his own defense encompasses more than merely providing information to counsel; it extends to comportment in

the courtroom before the jury. See United States v. Hemsi, 901 F.2d at 296. The United States Supreme Court has said that if a defendant knowingly misbehaves at trial, the trial judge ordinarily has the power to have him removed from the courtroom and to continue the trial in his absence. See id. (citing Illinois v.Allen, 397 U.S. 337, 346 (1970)). However, when the defendant's misconduct is the result of a mental disease or defect, he cannot be said to have made an intelligent and voluntary choice. Id., Cf. Pate v. Robinson, 383 U.S. 375, 384 (1966) ("it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial"). If the defendant's conduct is beyond his rational control, the trial must be suspended until his competency is fully evaluated. Id. (citing Drope v. Missouri, 420 U.S. at 181-82).

In his deposition, Attorney Consoldane described the problems of representing a defendant who is not present: ". . . what made it worse is that he was, then, banished to a jury room, and they rigged up a video. He wasn't in the courtroom with us; it's extremely difficult to try a case without the defendant sitting there with you." (Consoldane Dep. 13).

One example of Sean's inability to assist in his own defense was his refusal to cooperate with psychological testing that was proposed by the psychologist retained to evaluate Sean for the mitigation phase of the trial. There is much in the records to suggest that he was not competent at that time and therefore may not have been capable of

making fully informed choices that were in his best interest.

4. The trial court failed to obtain from Sean Carter a waiver of his right to be present at the sentencing phase of his capital trial.

Under clearly established federal law, Sean Carter had a right to be present at all critical stages of his trial. Hopt v. Utah, 110 U.S. 574, 579 (1884); Lewis v. United States, 146 U.S. 370, 573-74 (1892). Although Sean could waive his right to be present, no waiver by him of a constitutional right may be presumed from silence in the record. See Miranda v. Arizona, 384 U.S. 436, 444 (1966) (waiver of constitutional right may not be presumed from silent record.) The record must instead clearly demonstrate that Sean knowingly and voluntarily waived his right to be present. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Otherwise, no waiver of his constitutional right may be implied. See id.

Prior to the penalty phase of the trial, Attorney Consoldane did talk Sean into coming back into the courtroom. He convinced him of the importance of being in the courtroom for the sentencing phase. Consoldane then informed the judge that Sean wanted to be in the courtroom for the penalty phase. The judge asked the deputies if they could protect everyone the deputies said they could protect everyone except Sean's two lawyers. Consoldane said he would waive protection, Lewis would not. The judge told them that unless they both agreed, Sean would not be allowed back in the courtroom. (Consoldane Dep. 14-15). As a result,

Sean was not brought back into the courtroom for the penalty phase.

The trial transcript indicates that Attorney Consoldane told the court that Sean wanted to be unshackled if he came back into the courtroom. The court would not permit this. (Tr. 3094-99). A deputy told the court that Sean wanted his feet unshackled, and that he was more concerned with his feet than his hands. (Tr. 3099). Consoldane said in his deposition that Sean never said he would only come back into the courtroom if he was unshackled. (Consoldane Dep. 30). Because the trial court did not bring Sean back into the courtroom to ask him what he wanted to do, we cannot know from the record if he was truly waiving his right to be present or even if he had an understanding of the proceedings at that point, or an ability to assist his counsel.

Rather than permitting defense counsel to waive Sean's right to be present, the court should have held an on-the-record hearing to again advise Sean of his right to be present to obtain a personal waiver in the open court. See United States v. Gordon, 829 F.2d 119, 125 (D.C. Cir. 1987). Otherwise, we cannot know his state of mind, and whether his waiver was knowing, voluntary, and intelligent.

Sean's absence from the courtroom during the penalty phase had a devastating result. As Consoldane observed, ". . . it's real easy for a jury to kill somebody they don't know. I mean, they don't have any human contact with—if he's sealed up behind a door in the back, he's made out to be some kind of a monster, you know, not even civilized enough to be able to stay in the courtroom during all

of this." (Consoldane Dep. 13). Consoldane believed that if Sean had been in the courtroom as the psychologist testified about his tragic life circumstances, his life would have been spared. (Consoldane Dep. 16).

If medication could have helped Sean be competent for his trial, that option should have been explored. He never received a complete psychological evaluation, and was never treated with antipsychotic drugs. Sean's attorneys were put in the position by the court of having to choose their own possible safety over having their client in front of the jury during the most crucial phase of his trial, the determination of whether he would live or die. The court's failure to reexamine the issue of Sean's competency prior to the sentencing phase of his trial was error. Further, if he was incompetent, any waiver of his right to be present was not valid. The trial court's failure to inquire as to his competency and/or his waiver of the right to be present was constitutional error, and guaranteed a sentence of death. Sean Carter's trial attorneys also rendered ineffective assistance of counsel by failing to again raise the issue of Sean's competency during his trial, particularly in view of the fact that they themselves were convinced that Sean's absence from the courtroom would guarantee a death sentence.

5. Sean Carter was prejudiced.

The trial court did not recommend inpatient observation and evaluation of Sean with the provision of necessary treatment to stabilize his mood, reduce his paranoia and feelings of persecution, control his hallucinations, organize his thoughts and allow him to remain in control of his

thoughts and behaviors without a death wish prior to proceeding to trial. (Stinson Aff. 46). There is ample evidence to show that Sean appears to have adopted a fatalistic self-defeating motivation throughout the pre-trial, trial, and sentencing phases of his case. (Stinson Aff. 22).

When Sean Carter was found competent to stand trial, he was made to stand trial in spite of the following: he was depressed, he had a death wish, and he was suicidal; he was experiencing hallucinations; his thoughts were disorganized, confusing, and bizarre; he had persecutory or paranoid ideas; he had difficulty with sequential reasoning; he clearly did not get along with his attorneys and, in fact, had homicidal fantasies toward them; and he lacked any motivation for a favorable outcome. (Stinson Aff. 34).

At the time of his trial, Sean lacked the capacity to relate adequately to others, including his attorneys. He was unable to consistently provide a rational, logical, and organized account of his version of the offenses charged; he lacked the ability to meaningfully participate in the planning or execution of a defense strategy; and lacked sustained effort and concentration, which would interfere with being able to meaningfully track legal proceedings and challenge prosecution witnesses. He was experiencing unstable mood and suspicion toward his attorneys, which would interfere with his ability to comprehend and critically evaluate legal advice; lacked motivation for a favorable outcome, and harbored a concomitant death wish, which would interfere with his ability to make and exercise decisions that were in his long-term best interests.

He was unable to tolerate the stress of a trial or conform his behavior to the demands of the courtroom. (Stinson Aff. 46).

Sean Carter's trial was conducted without him: without his participation and assistance, and indeed without his actual physical presence in the courtroom. He was thereby prejudiced.

GROUND FOR RELIEF TWO

Sean Carter's right to effective assistance of counsel during the mitigation phase was violated when counsel failed to investigate, prepare, and present relevant mitigating evidence. U.S. Const. amends. VI, VIII, XIV.

Trial counsel failed to adequately investigate, prepare, and present mitigating evidence that was available at the time of Sean Carter's trial. The evidence trial counsel did introduce at mitigation was inadequately presented and explained, and failed to fairly depict Sean's character, history and background, including his childhood neglect and trauma, serious mental illness, family history of mental illness, substance abuse and neurological impairment. Trial counsel also failed to introduce any information about the impact a structured prison environment could have on Sean should he be given a life sentence.

A capital defendant has a constitutionally protected to right to have mitigation evidence prepared and presented on his behalf. Williams v. Taylor, 529 U.S. 362, 390-91 (2000). Failure to investigate or present mitigating evidence constitutes ineffective assistance of counsel at the penalty phase of a capital trial. Id. at 398-99; Austin

v. Bell, 126 F.3d 843 (6th Cir. 1997); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995). Defense counsel has a duty to conduct a reasonable investigation and explore all reasonably available mitigating evidence, including following up on "red flags" that arise during the investigation. Rompilla v. Beard, 125 S.Ct. 2456 (2005).

Without a comprehensive and coherent theory of mitigation presented, the jury was unable to process, understand, or contextualize any of the evidence of Sean's traumatic background and mental illnesses, or the positive impact life in prison structure could have upon him. Instead, they were presented with an image of a mechanical killer who was unable to feel emotion, have empathy for others, or express remorse.

1. Incomplete and inaccurate depiction of Sean's childhood trauma, neglect, and developmental difficulties

Sean Carter and his family had an extensive seven-year history of involvement with Trumbull County Children Services, including serious physical and emotional neglect by his mother that led to the termination of her parental rights, a long-term foster care placement with Ida Magee, a disrupted adoption with James and Rebecca Smith, and an adoption into the Carter family. Numerous records available at the time of Sean's trial documented his developmental problems, learning disabilities, behavioral issues, and Sean's unmet need for extensive psychotherapy and counseling. Sean's difficulties persisted even after he was adopted by the Carters, and were exacerbated by the stressful

home environment and their ultimate rejection of him.

The only witness from Children Services who testified at mitigation was Nancy Dorian, a psychologist whose last assessment of Sean occurred in November 1986. Ms. Dorian had no information about what happened to Sean since 1986, and had not even read the Children Services case file that was introduced into evidence, other than the three developmental progress reports that she had personally prepared. She knew nothing about whether her recommendations for Sean were followed, knew nothing about either family that adopted Sean or his relationships with them, and had not even seen Sean since the end of 1986, when he was 7 years old. (Tr. 3263, 3289, 3301).

Dr. Sandra McPherson, a clinical psychologist and "mitigation specialist," provided a summary of the major events in Sean's young life, including his removal from his mother, his relationship with his long-term foster mother, Ida Magee, his failed adoption with the Smiths and his adoption by the Carters. She also diagnosed Sean with Antisocial Personality Disorder, Borderline Personality Disorder, and psychopathic features. (Tr. 3316-17). She admitted that her diagnosis of psychopathic character or features was not a diagnosis listed in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV). (Tr. 3318).

The cursory overview of Sean's life provided to the jury by Dr. McPherson was an injustice to his extensive family and psychosocial history of serious mental illness, substance abuse, neurological deficits, developmental problems, and learning

disability. She portrayed Sean as a "psychopath" for whom there was no hope of recovery. She described him as lacking feeling, remorse, or empathy for others. Rather than eliciting any of the positive information about Sean and his bond with Ms. Magee, Dr. McPherson cast Sean as an outsider, not like the rest of society and incapable of human connection and emotion. She stated that psychopathic personalities such as Sean's, are "so severely disrupted that they simply do not feel or see or comprehend the world in the way do . . . He lacks an understanding of pain; he doesn't have the ability to know what other people are thinking, nor does he care; he's always alone." (Tr. 3318). Trial counsel reiterated this outsider, nonhuman status during closing, referring to Sean as a "piece of machinery" and comparing him to a piece of defective equipment and a bomb waiting to explode, further distancing Sean from the jury and making it more difficult to see in him a life worth saving. (Tr. 3369, 3375-77).

Although a number of medical, legal, and social service records were admitted into evidence, trial counsel failed to put these documents into an appropriate context for the jury. Instead, the jury was urged to wade through a large number of documents and to "go through it and timeline it, whatever, and figure it out" on their own. (Tr. 3379). The jury had to make sense of the numerous factors that lead to Sean's developmental issues and mental illnesses, without appropriate guidance from trial counsel as to the significance or relative importance of the admitted documents. It is not sufficient to admit into evidence crucial documents substantiating the facts of Petitioner's traumatic childhood without providing any guidance or context

for the jury, let alone any research data supporting any of Dr. McPherson's conclusions. Trial counsel abdicated their duty to provide the link between Sean's traumatic history and background to the person he became, a link critical for an effective mitigation presentation.

One of the omissions from the mitigation presentation was information regarding the possibility that Sean was sexually abused. Dr. McPherson testified to the apparent sexual abuse Sean suffered at a young age, "that leaves its own residue of rage." (Tr. 3314). Upon cross-examination, Dr. McPherson admitted that the source of information about the possible abuse was possibly Sean himself, who had been known to lie. (Tr. 3328-29). However, records document that Sean's half-uncle, Carlton Spellman, a diagnosed schizophrenic since 1969, was sexually preoccupied and had been seen openly masturbating in front of others. (Mit. Hrg. Exs. P. 200). A social worker who interviewed him believed that a child confronted by Carlton "would not be able to set limits or to take protective measures to prevent a sexual encounter." (Comp. Hrg. Exs. P. 45-46). Instead of bolstering the allegation of sexual abuse by pointing to the Children Services records documenting the uncle's inappropriate sexual behavior, Dr. McPherson let stand uncorrected the inference that Sean was lying about being abused.

Sean's educational history was also erroneously characterized. Dr. McPherson stated that Sean was capable of normal to slightly below normal intellectual function, but that he had a "complete lack or relative lack of indifference to

school . . . he hasn't bothered leaning a lot." (Tr. 3310). She also stated that he did well in elementary school, getting As and Bs. (Tr. 3340-41, 3354).

However, Sean was enrolled in a Learning Disability program during elementary school. (Ex. A, Stinson Aff. 19). While he did well and was considered "successful" in special education programs, "[h]is grades deteriorated and his academic commitment and performance weakened when he was no longer provided with the support inherent in a special education program." (Stinson Aff. 19). Evidence of Sean's learning disability and his subsequent academic decline once his support system was removed were not presented to the jury. Instead, the jury was left only with evidence that Sean was of normal intelligence, but just did not want to put forth effort or learn anything.

While Dr. McPherson testified as to the disrupted adoption by the Smiths, trial counsel did not elicit testimony regarding the specific emotional abuse that Sean suffered while under their care. When describing Sean's adoption by the Smiths, Dr. McPherson stated "[H]e [Sean] failed at that adoption. He could not meet their expectations." (Tr. 3307).

Rather than describing Sean's inability to meet the Smiths' expectations, trial counsel should have presented evidence that the Smiths berated Sean by calling him names such as "dummy" and "stupid," and failed to understand the nature of his leaning disability. (Stinson Aff. 14). The Smiths described him as "strange," and Mrs. Smith did not have patience with him, as he acted younger than his age and did not understand a lot of things. (Stinson

Aff. 14). Mrs. Smith frequently cursed in front of and at Sean, and believed the only way to get through to Sean was to scream at him and spank him. (Stinson Aff. 14). Mr. Smith never initiated any conversations or activities with Sean, and both Mr. and Mrs. Smith were overly critical. (Stinson Aff. 14). Sean went from a loving, patient foster mother to a family who did not understand his special needs, criticized and emotionally abused him, and then rejected him within a few months.

Despite Dr. McPherson's testimony about the nature of the Carter household, Sean's life did not improve once he was adopted into their family. After listing all of the services that Sean would have needed to recover from his childhood traumas, Dr. McPherson stated that "by the time he is moved the second time from Magee I don't think anybody could have done much of anything for him." (Tr. 3323). While Dr. McPherson acknowledged that she had never met Gerry or Evely Carter, she did agree that the Carters were suitable adoptive parents for Sean "because of their experience and from their ability employment-wise to adopt children." (Tr. 3344). She described the Carters first meeting with Sean as "heroic behavior on the part of the Carters." (Tr. 3354). Dr. McPherson stated that during his teenage years Sean had "little or no relationship with his family and they are severely concerned about him because of the threat that he presents to their peace and tranquility and to their daughters." (Tr. 3310). Trial counsel emphasized during closing argument that the Carters were a nice family, "a fine family," and that Evely Carter was a "nice woman, beautiful woman." (Tr. 3375).

While the mitigation presentation suggested that the Carters were an appropriate and caring family to adopt Sean, the facts of his adoptive experience belie such a claim. Sean began "exhibiting behavioral manifestations of his anxiety and emotional turmoil: soon after he moved in with the Carters, engaging in attention-getting behaviors and expressing concern about having to go to a new school and make new friends. (Stinson Aff. 15). Financial hardship was a factor in the Carter family, as their monthly expenses were greater than their income, and they could not afford even the $250.00 fee to finalize the adoption. (Ex. A, p.16). Despite their financial problems, the Carter adoption was finalized and Children Services closed Sean's case, without any provisions for Sean to get the follow-up therapy and care that he needed. (Stinson Aff. 16). Even Mrs. Carter believed that Sean needed psychological help, yet he never received any treatment or counseling once he was adopted by the Carters. (Stinson Aff. 16-17).

Sean alleged that he was physically abused by Mr. Carter, and he was exposed to pornographic materials owned by Mr. Carter and an older adolescent boy who was also living in the home. (Stinson Aff. 16). Sean was accused of inappropriate sexual conduct with the girls who were living in the Carter home, and delinquency charges were filed against him. Mrs. Carter threatened to cut his penis off, and the Carter family "admitted they would have killed Sean had he not been in detention." (Stinson Aff. 16). By March 14, 1995, when Sean was 16 years old, the family referred Sean to juvenile court and stated that they were "nearing the end of their tolerance" for him. (Mit. Hrg. Exs. p. 68).

Mrs. Carter admitted to Sean's probation officer that "she feels it was too late to make any substantial impact in Sean's life." (Comp. Hrg. Exs. p. 13). Within six years of his adoption by the Carters, the family had given up on Sean. He was adopted into a home which was financially unstable, could not provide or seek out for him the psychological services he needed, and contained accessible, sexually explicit materials. Once Sean reached adolescence and his emotional and behavioral problems began to surface, the Carters abandoned him.

The one person who had a long-term, loving, positive relationship with Sean, his foster mother Ida Magee, was not contacted by trial counsel or Dr. McPherson. Ms. Magee had information about Sean necessary for an accurate and complete mitigation case. If called to testify, Ms. Magee would have told the jury that Sean was a "sweet boy, kind, quiet, and a nice kid" whom she loved. (Ex. C, Magee Aff. 1). She would have discussed how when Sean lived with her he loved to play with Tinker Toys and played baseball and badminton, and that although he had a learning disability, "if time was taken with Sean, he would do fine once he learned." (Magee Aff. 2). She was more than willing to adopt Sean, but Children Services' regulations at the time prevented her from adopting him. (Magee Aff. 2).

Ms. Magee could have also testified about Sean's adoption by the Carters, and that she had concerns about their ability to care for him and for Sean's ability to leave her home and move out to the country with them. (Magee Aff. 3-4). The Carters did not alleviate any of Sean's trauma from separating with Ms. Magee, and refused to let Sean

visit her or speak with her on the phone for the first two years after the adoption. (Magee Aff. 3). Ms. Magee's testimony was crucial for a competent presentation of mitigation evidence, especially since Sean's adopted family was also the victim's family, and therefore might have been reluctant to testify on Sean's behalf.

Ms. Magee was the only person available who could humanize Sean and evoke images of him as a little boy who was trying hard to please but suffered serious, debilitating setbacks in his young life. Yet, she was not even contacted by Sean's trial counsel or mitigation specialist.

Sean Carter's trial counsel failed to investigate, prepare, and present the complete and accurate picture of Sean's traumatic childhood. Counsel ignored records available and presented misleading and inaccurate testimony regarding Sean's sexual abuse, learning disability, and the Smith and Carter families. They failed to cohesively present records to the jury, failed to call a critical mitigation witness, Ida Magee, and offered a damaging, unnecessary, "psychopath" diagnosis. Instead of presenting a cohesive and comprehensive assessment of Sean's life, they took a piecemeal approach, distorting some of the facts of his life and neglecting other issues entirely. Counsel's numerous failures in presenting mitigation evidence regarding his history, character, and background prejudiced Sean in the mitigation phase.

2. Petitioner's serious mental illness.

Trial counsel failed to adequately investigate and present evidence during the penalty phase of

Sean Carter's serious mental illness. Sean's mental illness manifested itself very early in his childhood. His counsel failed to present an accurate and complete picture of his symptoms, their duration and severity, and the link between his mental illness and the offense.

Dr. Bob Stinson, a psychologist, reviewed the records regarding Sean that were available at the time of his trial. Numerous references to symptoms of mental illness Sean exhibited during his childhood and adolescence were noted throughout Children's Services and Department of Youth Services records:

> Indeed, during his childhood, prior to the offenses charged, Sean was diagnosed with anxiety and childhood depression, he was said to be schizoid-prone, mental status examinations revealed symptoms consistent with a psychotic disorder, psychological testing showed that he was experiencing a severe mental illness, and while it was recommended by mental health professionals that he obtain counseling, none was ever sought or obtained on his behalf. (Stinson Aff. 8).

Trial counsel failed not only to highlight the symptoms of Sean's mental illness during his childhood and adolescence, but they also failed to introduce any evidence that Sean was suffering from a serious mental illness at the time of the offense as well. Albert Linder, a psychiatric social worker who evaluated Sean on November 6, 1997, noted that it was clear that Sean suffered from "major psychosocial difficulties" and that he may be suffering from a major psychiatric disorder, marked

by "the possibilities of hallucinations, paranoid thinking, and interrupted thoughts." (Ex. G, Linder Report 5). Mr. Linder also determined that Sean was laboring under a delusional belief system and suffered from paranoia. (Linder Report 4-5). He was suspicious and hypervigilant throughout Mr. Linder's interview, revealed both auditory and visual hallucinations, and abruptly ended some of his answers. (Linder Report 2). Dr. Douglas C. Darnall, a psychologist, also interviewed Sean with Mr. Linder on two occasions and informed counsel that Sean was "suffering from a mental disorder, which could prove to be mitigation under the present circumstances." (Ex. H, Darnall Letter).

Despite a history of mental illness and evidence that Sean was presently suffering from a mental disorder, trial counsel did not investigate or present evidence of his mental illness to the jury during the mitigation phase.

3. Serious mental illness in Petitioner's family; Schizophrenia.

Children Services records available at the time of Sean's trial include ample documentation of his birth mother, Barbara Robert's, struggles with Schizophrenia and its effect on her ability to parent her children. Records also reveal that a half-sister and a half-brother of Ms. Roberts were also diagnosed Schizophrenics. Yet Sean's trial attorneys did not introduce any evidence during mitigation regarding the genetic nature of Schizophrenia and the high likelihood that Sean Carter himself was suffering from, or would develop, Schizophrenia. Instead, Dr. McPherson merely acknowledged that he was "carrying a genetic potential" for

Schizophrenia and that it was a "toss-up" whether he would ever develop a mental disease. (Tr. 3316, 3335).

Dr. Bob Stinson, a psychologist who examined the records available to the trial attorneys at the time of the mitigation hearing, noted:

> Frankly, it is difficult to imagine that a mental health professional who adequately reviewed Sean Carter's family history and own emotional history could credibly interpret his mental state at the time of the evaluations in this case as being indicative of anything other than a severe mental illness. (Stinson Aff. 9).

Sean Carter was at a substantially higher risk for developing Schizophrenia, since "first-degree biological relatives of individuals with Schizophrenia have a risk for Schizophrenia that is about 10 times greater than that of the general population." (Stinson Aff. 9).

Along with the genetic predisposition to schizophrenia, Sean Carter was also traumatized by the experience of having a mother whose serious mental illness prevented her from providing adequate affection and care for her children. Trial counsel failed to present any evidence of the severity of Ms. Roberts' disease and how it affected her parenting skills and functioning. Evidence available at the time of Sean's trial showed that Ms. Roberts engaged in disorganized behavior and illogical thinking, was socially withdrawn, and was unable to show emotional responses or take care of activities of daily living. (Stinson Aff. 8). None of these persistent symptoms of Schizophrenia, or their

impact on a person's ability to be an adequate parent, were explained to the jury. Dr. McPherson also failed to draw the parallel between Ms. Roberts' symptoms and the same symptoms which presented in Sean. (Stinson Aff. 9).

Trial counsel's failure to prepare and present this evidence of the impact of familial mental illness, given the serious family history of Schizophrenia, was inexcusable.

4. Neurological dysfunction

Sean Carter's counsel failed to adequately investigate evidence of his neurological impairment. Sean had a documented medical history of seizures at a very young age, as well as history of inhalant usage and a learning disability. Despite trial counsel's awareness of this history, they did not seek a neuropsychological assessment of Sean. Instead, Dr. McPherson testified that the seizures were purely emotional and that "this apparently cleared up" without describing any possible long-term, neurological consequences. (Tr. 3306, 3319, 3340). The only testimony offered during mitigation regarding inhalant usage was that Sean chose to do drugs and it made it impossible to determine whether Sean was suffering from lapsed thinking on account of his past drug use or the onset of Schizophrenia. (Tr. 3316, 33335).

Dr. Michael M. Gelbort, a neuropsychologist, examined Sean's medical and social history records that were available at the time of trial. Because Sean was so young when he experienced these seizures, they could not have been "pseudoseizures" and his developmental delays could not have been

triggered by purely emotional causes. (Ex. B, Gelbort Aff. 2). Instead, the seizures and inhalant usage should have prompted Sean's trial counsel to consult a neuropsychologist to determine whether or not these factors were correlated with neurocognitive dysfunction. (Gelbort Aff. 2). Competent trial counsel who knew that Sean had seizures as a young child would have enlisted the services of a neuropsychologist to assess whether Sean sustained any neurological damage. Despite clear indications of neurological problems, trial counsel failed to obtain a neuropsychologist to investigate and present evidence of Sean's impairments.

5. Polysubstance abuse

Evidence that Sean was a substance abuser was introduced at mitigation without any regard for explaining or contextualizing this devastating problem, or its interaction with his underlying mental illness. Dr. McPherson noted that Sean had abused drugs since age 13 or 14, and testified that when he made the decision to use drugs he knew what he was doing. (Tr. 3316, 3335).

Sean's history of substance abuse at an early age was not presented to the jury, nor was any information about the impact of substance abuse on an adolescent's development. A substance abuse assessment of Sean conducted by the Portage County Juvenile Court on April 14, 1994, indicated that "his 'lack of knowledge' about chemicals could be detrimental to him." (Ex. I, Chem. Dep. Assessm. 4/19/94). An evaluation conducted by the Department of Youth Services on June 16, 1995 documented that Sean had used marijuana, cocaine, acid, and inhalants, and used at least marijuana and

inhalants regularly. (Ex. J, DYS Eval. 3/27/95). Several of his delinquency charges stemmed from his substance abuse, including charges of drug abuse and possession of drug paraphernalia. During pre-trial evaluations of Sean, he was diagnosed with Polysubstance Dependence and it was noted that he had inhaled gasoline on the day of the offense. (Stinson Aff. 19-20). None of this evidence of Sean's chronic substance abuse was presented to the jury.

6. Effect of a structured prison environment

Trial counsel did not present any mitigation evidence of the positive impact a structured environment such as prison could have on Sean. Instead, the mitigation presentation emphasized that Sean was beyond help, could not change, and was full of unpredictable rage that he would act upon without thinking. Rather than presenting Sean Carter as an unredeemable person, trial counsel should have investigated and presented evidence of the prison environment and how it could regulate Sean's behavior by providing him with structure and discipline.

Dr. Stinson noted a number of protective factors that would be provided for Sean by a correctional facility:

> a) Prison provides for consequences to aberrant behavior, thereby decreasing the likelihood that the types of behaviors Sean Carter engaged in while in the community would be repeated in prison.

b) Confinement and supervision imposes structure and limits access to law breaking behavior.

c) Vigilant staff members provide support and structure that may have been lacking in the community.

d) The high degree of structure imposes limits externally—limits that Sean Carter may lack internally.

e) Prison provides for the development of lifetime mates, which can serve to mitigate against the risk of future offending and violence. (Stinson Aff. 41-42).

Such information critical to the issue of whether Sean Carter should spend his life in prison or be put to death was not presented to the jury. Sean's trial counsel should have investigated and presented such evidence during the mitigation phase.

GROUND FOR RELIEF THREE

Sean Carter's rights to a fair trial and an impartial jury were violated by prosecutor misconduct at the culpability phase of Mr. Carter's trial. U.S. Const. amend. VI and XIV.

The standard of review for prosecutorial misconduct is one of due process; the misconduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)) ". . . [E]ach case turns on its own unique facts and . . . only a full review will reveal

whether a constitutional violation took place." Cook v. Bordenkircher, 602 F.2d 117, 120 (6th Cir. 1979)

Even where the case against a defendant is "relatively straightforward and strong" flagrant prosecutorial misconduct will warrant relief where there is "grave doubt" as to whether the misconduct 'had substantial and injurious effect or influence in determining the jury's verdict." Boyle v. Million, 201 F.3d 711, 717-18 (6th Cir. 2000), citing Brecht v. Abrahamson, 507 U.S. 619, 637 (quoting Kotteakos v. United States, 328 U.S. 750 (1946)

Although prosecutorial misconduct can happen at any point throughout the trial, it is especially dangerous during closing argument. In Sean Carter's case, the prosecutor erroneously peppered his closing statement with his personal beliefs regarding the strength of the state's case and Sean's guilt, stating at one point: "I believe in my side. I believe the evidence that we have that this defendant is guilty of all the charges. I wouldn't be here." (Tr. 3116).

The prosecutor also professed his personal opinion about Sean's guilt when he erroneously denigrated Sean's defense characterizing his explanations as to why he went to the victim's house on the night of the murder as "absolutely absurd." (Tr. 3116).

The prosecutor again voiced his personal opinion when he impermissibly vouched for the credibility of and bolstered the testimony of Dr. Cox, the pathologist, concerning the bleeding in the victim's brain by stating, "I think Dr. Cox's

explanation is better than the other doctor's . . . ." (Tr. 3130).

In addition, the prosecutor also committed misconduct when he asked Major James Phillips of the sheriff's office questions concerning who issued the search warrants to obtain blood samples from Sean. Major Phillips response revealed that Judge McKay, the trial judge presiding over Sean's trial, had signed the warrant. This information was not essential to the state's case and impermissibly relayed the message to the jury that Judge McKay believed Sean Carter was guilty.

During closing argument in the culpability phase, the prosecutor's use of inflammatory language was pervasive. He spoke of victims' constitutional rights, the "great indignity" of the crime, a death that was "unbelievable," and "brutality," the victim's pain and suffering, and repeatedly reminded the jury that this was done by a grandson to his grandmother. (Tr. 3111, 3115). He argued that "it's absolutely necessary . . . that people like Sean Carter be put out of commission. His mission of terror, violence, is incredible." (Tr. 3115). He told the jury that they had to go through nude photographs of the victim because of Sean Carter, and that they had to look at stab wounds and "blood all over the place" and swabs of the victim's anal cavity because of Sean Carter. (Tr. 3115).

The prosecutor argued facts not in evidence when he said, ". . . you'll see him in the videotape. 'I don't have to say I'm sorry.'" Sean Carter did not say this in the videotaped interview. (Tr. 3118). The prosecutor referred to Sean as "a machine, a supposed human being." (Tr. 3118). He argued that

Michael and Shasta didn't "come back and kill and rape grandma." (Tr. 3120).

The prosecutor even tried to argue prior calculation and design, even though Sean was not charged with this element. Although the prosecutor acknowledged that he "got carried away," the improper argument was prejudicial. (Tr. 3201).

These instances of misconduct tainted the culpability phase of Sean Carter's trial. His due process rights to a fair trial and an impartial jury were violated by the singular and cumulative effect of this state misconduct.

GROUND FOR RELIEF FOUR

The trial court denied Sean Carter his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to instruct the jury properly at the conclusion of the culpability phase.

Sean Carter was charged with aggravated murder, rape, aggravated robbery, and aggravated burglary. The trial court failed to instruct the jury on the lesser-included offenses to aggravated murder (murder and manslaughter), aggravated robbery (theft), and rape (gross sexual imposition). Although the evidence warranted instructions on murder, manslaughter, theft, and gross sexual imposition, the trial court failed to instruct the jury as to any of these lesser-included offenses. Without these lesser-included offense instructions, the jury's only choice was to convict Sean of capital murder or acquit him.

An instruction on a lesser included offense is required where the evidence presented at trial would

reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense. State v. Thomas, 40 Ohio St. 3d 213, 533 N.E. 2d 286 (1988) (par. 2, syllabus)

The failure of the trial court to instruct the jury as to these lesser offenses deprived Sean of an opportunity to have the jury consider his guilt for offenses which did not provide death as a potential penalty, thereby violating his constitutional rights. See Beck v. Alabama, 477 U.S. 625 (1980).

GROUND FOR RELIEF FIVE

Sean Carter was denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution when his attorneys failed to object and properly preserve numerous errors that occurred during the pre-trial proceedings and the culpability phase of the trial.

Sean Carter's trial counsel rendered deficient performance at the pre-trial proceedings and at the culpability phase of his trial. Strickland v. Washington, 466 U.S. 668 (1986). Counsel's performance fell below an objective standard of reasonableness and Sean was thereby prejudiced.

1. Sean Carter's trial counsel failed to object to several instances of prosecutorial misconduct at the culpability phase of the trial.

For example, during closing arguments, the prosecutor impermissibly voiced his opinion regarding the strength of the state's witnesses and

case and Sean's guilt. Specifically, the prosecutor stated during closing argument: "I believe in my side. I believe in the evidence that we have that this Defendant is guilty of all the charges. I wouldn't be here." The prosecutor also professed his personal beliefs when he characterized Sean's explanation as to why he went to the victim's house on the night of the murder as "absolutely absurd."

In addition, defense counsel failed to object when the prosecutor vouched for the credibility of and bolstered the testimony of Dr. Cox, the pathologist by stating, "I think Dr. Cox's explanation is better than the other doctor's. . . ."

Defense counsel failed to object to numerious other instances of prosecutorial misconduct. (See Ground for Relief Three).

Defense counsel had a duty to object to these instances of prosecutorial misconduct. Defense counsel's failure to object constitutes deficient performance. Counsel's deficient performance prejudiced Sean Carter. Because counsel failed to object, these errors were subject to plain error review by the Ohio Supreme Court. "A claim of error in a criminal case cannot be predicated upon the improper remarks of counsel during the argument at trial, which were not objected to, unless such remarks serve to deny the defendant a fair trial." State v. Wade, 53, Ohio St. 2d 182, 373 N.W. 2d 1244 (1978) (par. 1, syllabus)

2. Sean Carter's trial counsel was ineffective when they failed to vigorously pursue the issue of his competence throughout the proceedings.

Counsel did not testify at the two competency hearings held or present evidence to the trial court regarding Sean's inability to cooperate with them and his bizarre behavior. Counsel also did not present, through direct or cross-examination, all expert evidence of Sean's incompetence to stand trial. For example, counsel did not present the evidence of severe mental illness documented by Albert Linder and Dr. Douglas Darnall. (Exs. G, H).

Counsel failed to provide all records of Sean's history to Dr. King. Nor did they effectively cross-examine Drs. Palumbo and Alcorn, to reveal the inconsistencies and inadequacies of their testimony, for example the failure to review all records and to interview collateral contacts. (Ex. A., Stinson Aff.). Counsel did not request a neuropsychological examination. (Ex. B, Gelbort Aff.).

In addition, trial counsel should have requested another competency hearing during the proceedings when it again became apparent that Sean was not competent to proceed. Furthermore, because counsel did not provide the trial court with this additional evidence of Sean's incompetence and did not request an additional hearing, trial counsel failed to preserve an accurate record for appeal regarding Sean's incompetence during his trial proceedings. Consequently, counsel's performance was deficient. Their deficient performance prejudiced Sean Carter. (See Ground for Relief One).

3. **Counsel failed to present argument concerning jury instructions on murder, manslaughter, theft, and gross sexual imposition—the lesser-included offenses to aggravated murder, aggravated robbery, and rape.**

Counsel's failure to make the appropriate argument was deficient. This deficiency prejudiced Sean Carter. (See Ground for Relief Four).

4. **Defense counsel negated their own theory of the case during closing argument.**

During closing argument in the culpability phase of the trial, defense counsel told the jury that they could find Sean Carter guilty of aggravated murder, aggravated robbery, and rape, *even if they had reasonable doubt*, thus not only undermining their argument for instructions on lesser included offenses, but in fact leaving the jury no choice but to find Sean guilty of the charged in the indictment. (Tr. 3185-86).

Defense counsel's behavior was objectively unreasonable and prejudiced Sean Carter.

GROUND FOR RELIEF SIX

Sean Carter was denied the effective assistance of counsel in his direct appeal as of right, in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Sean Carter was entitled to the effective assistance of appellate counsel on his first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 396 (1985);

Ohio Rev. Code § 2929.05. Appellate counsel is ineffective if counsel's representation is constitutionally deficient, and the deficiency prejudices the defendant. Strickland, 466 U.S. at 687; Smith v. Jago, 888 F.2d 399, note 1 (6th Cir. 1989).

Appellate counsel were ineffective for each instance, considered alone or cumulatively, in which they did not raise the following issues:

1. All instances of prosecutorial misconduct. Darden v. Wainwright, 477 U.S. 168, 181 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

2. All instances of ineffective assistance of trial counsel. Strickland v. Washington, 466 U.S. 668 (1996)

3. The failure of the trial court to ensure that Mr. Carter was competent throughout his capital trial, and failure to ensure that his right to be present was protected. Drope v. Missouri, 420 U.S. 162 (1975); Dusky v. United States, 362 U.S. 402 (1960)

Counsel's failure to include these claims was constitutionally deficient, because competent capital appellate counsel would have raised these patently meritorious claims. The substantive arguments demonstrating prejudice from each error are found in the individual argument relating to the claim for relief.

Due to appellate counsel's failure to present these issues, Petitioner was denied the right to a

meaningful review of his capital conviction and denied the effective assistance of counsel on appeal. See Evitts, 469 U.S. 387; Strickland, 466 U.S. at 685.

GROUND FOR RELIEF SEVEN

The death penalty as administered by lethal injection in the state of Ohio violates Sean Carter's rights to protection from cruel and unusual punishment and to due process of law as guaranteed by the United States Constitution amends. VIII and XIV.

Death by state-sanctioned lethal injection violates the due process protections of life and constitutes cruel and unusual punishment in violation of Petitioner's constitutional rights because it inflicts torturous, gratuitous and inhumane pain, suffering and anguish upon the person executed by this means.

Lethal injection consists of tying a human being to a table then forcing a needle into him through which flows a combination of drugs designed in theory to stop the heart, paralyze the breathing muscles, and sedate the person. This execution method has not been proven to be more humane or less painful than electrocution. "The much-vaunted and increasingly popular technique of lethal injection may well improve upon hanging, electrocution, and the gas chamber, in the same way as these improved upon burning at the stake, disemboweling, and drawing and quartering. But such improvement if it exists, is only incremental." WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE 200-201 (Northeastern Univ. Press 1996).

So far, since the first lethal injection in 1977, there have been "botched" executions which directly violate the Supreme Court's bar against torture or a "lingering" death. In Texas, Stephen Peter Morin's execution required that his arms and legs be probed for 45 minutes to find a vein. Randy Woolls, a drug addict, had to help executioners find a good vein for the syringe. It took 35 minutes to insert a catheter into the vein of Elliott Johnson. Raymond Landry was pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing. Two minutes into the killing, the syringe came out of his vein, spraying the deadly chemicals across the room, and the executioners had to reinsert the catheter into the vein. Stephen McCoy had such a violent physical reaction to the drugs (heaving chest, gasping, choking, etc.) that one of the witnesses (male) fainted, knocking over other witnesses. The Texas Attorney General admitted McCoy "seemed to have a somewhat stronger reaction, the drugs might have been administered in a heavier dose or more rapidly." It took more than 50 minutes to find a suitable vein in Rickey Ray Rector's arm, while witnesses heard his loud moans. During the ordeal, Rector, brain damaged from a lobotomy, tried to find a vein. It took 47 minutes to find a suitable vein in Billy Wayne White, who eventually helped find it. Justin Lee May had an unusually violent reaction to the drugs, and went into coughing spasms, groaned, gasped, lifted his head from the death chamber gurney. In Oklahoma, Robyn Lee Parks had a violent reaction to the drugs. Two minutes after the drugs began, the muscles in his jaw, neck, and abdomen began to react spasmodically, and Parks

gasped and violently gagged until death came 11 minutes after the drugs were administered. After John Wayne Gacy's execution began in Illinois, one of the three lethal drugs clogged the tube leading to his arm, and stopped flowing, which was blamed on the inexperience of the prison officials conducting the execution. Emmitt Foster, Scott Carpenter, Michael Elkins, and Joseph Cannon suffered protracted executions due to procedural foul-ups. Tommie Smith in Indiana, was not pronounced dead until 1 hour and 20 minutes after the executioners began to administer the drugs. Prison officials said they could not find a vein in his arm and had to insert an angio-catheter into his heart, a procedure which took 35 minutes. Similar attempts to insert a needle into Smith's neck and groin areas failed, after cutting back skin on his chest while Smith remained conscious. See (PC Ex. 22).

GROUND FOR RELIEF EIGHT

Sean Carter is seriously mentally ill. Therefore, his death sentence is in violation of his rights under the Eighth and Fourteenth Amendments.

Sean Carter is a person with a long-standing history of serious mental illness, which he suffered from at the time of the offense and which continues to afflict him presently. His serious mental illness renders him no more culpable for his crime than a juvenile or a mentally retarded person would be, but mentally retarded and juvenile offenders are categorically exempted from being executed under the Constitution. Accordingly, Sean Carter's execution despite his serious mental illness would violate the Cruel and Unusual Punishment Clause of

the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

The Constitution requires that certain categories of persons be exempted from execution when they are less morally culpable for their crimes. Mentally retarded persons are not subject to the death penalty "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses . . .." Atkins v. Virginia, 536 U.S. 304, 306 (2002). These impairments can also "jeopardize the reliability and fairness of capital proceedings." Id. at 306-07. The exemption from execution also applies to juveniles, as they are less mature, have an underdeveloped sense of maturity, are "more vulnerable or susceptible to negative influences and outside pressures," and their characters are not as well formed as adults. Roper v. Simmons, 125 S.Ct. 1183, 1195-96 (2005). The traditional justifications for the death penalty, retribution and deterrence, are not served by the execution of juveniles, as these "differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." Id. at 1196.

Sean Carter suffered from a severe mental illness at the time of the offense, which was committed just six months after his eighteenth birthday. Dr. Bob Stinson, a psychologist who reviewed the records available on Sean at the time of his trial, determined that Sean's "functioning generally, and his ability to assist in his own defense specifically, was compromised by a severe mental illness." (Ex. A, Stinson Aff. 47). Sean's mental illness manifested itself very early in his childhood

and persisted through adolescence, with his first psychotic episode occurring at age sixteen. (Stinson Aff. 7). As a child, "Sean was diagnosed with anxiety and childhood depression, he was said to be schizoid-prone, mental status examinations revealed symptoms consistent with a psychotic disorder, [and] psychological testing showed that he was experiencing a severe mental illness." (Stinson Aff. p. 8). Although mental health professionals who examined Sean recommended counseling, "none was ever sought or obtained on his behalf." (Stinson Aff. 8).

Along with these manifestations of mental illness very early in his life, Sean also has a history of severe mental illness in his family. Sean's mother "had a well-documented history of schizophrenia, inclusive of several psychiatric hospitalizations," and Sean's half-uncle and half-aunt were also both diagnosed as Schizophrenics. (Stinson Aff. 8-9). Schizophrenia in a first-degree biological relative increases the chance that an individual will develop Schizophrenia to 10 times more than the risk in the general population. (Stinson Aff. 9). Sean Carter has three first-degree relatives who were diagnosed as schizophrenics.

Symptoms of Sean's mental illness were apparent during evaluations of his competency and sanity prior to his trial. Noted throughout the evaluations are symptoms of a serious mental illness, including: "a depressed mood, irritability, suicidal thoughts, auditory hallucinations, inappropriate laughter, confusing and bizarre statements, and the possibility of persecutory ideas." (Stinson Aff. 27). Sean exhibited bizarre behavior and was "exhibiting

unusual mannerisms, presenting as detached and distant, displaying an unusual affect, and appearing distracted at times for no apparent reason." (Stinson Aff. 32). Dr. Stinson stated, "it is difficult to imagine that had any one of the evaluators reviewed all the records available, consulted with collateral contacts, and then evaluated Sean Carter, that they could have come to any conclusion other than he was suffering from a severe mental illness at the time of their evaluations." (Stinson Aff. 35).

Dr. Michael M. Gelbort, a neuropsychologist, evaluated Petitioner and determined that he is suffering from a "significant and debilitating mental illness with a loosening of contact with reality and indications of auditory hallucinations," which appears to have been present for some time. (Ex. B, Gelbort Aff. 3). Sean has limited abilities in "higher level reasoning, problem solving, and information processing." (Gelbort Aff. 3). His intellectual performance "is now in the borderline mentally defective range of functioning," and he also displays impairments in his language skills and ability to comprehend complex information. (Gelbort Aff. 2-3).

Albert Linder, a psychiatric social worker who evaluated Sean on November 6, 1997, noted that it was clear that Sean suffered from "major psychosocial difficulties" and that he may be suffering from a major psychiatric disorder, marked by "the possibilities of hallucinations, paranoid thinking, and interrupted thoughts." (Ex. G, Linder Report 5). Mr. Linder also determined that Sean was laboring under a delusional belief system and suffered from paranoia. (Linder Report 4-5). He was suspicious and hypervigilant throughout

Mr. Linder's interview, revealed both auditory and visual hallucinations, and abruptly ended some of his answers. (Linder Report 2).

Since his conviction, Sean has been formally diagnosed as a paranoid schizophrenic. Medical documentation establishes that he is delusional, suffers from hallucinations, has limited insight, and can only engage in very basic and concrete thinking. (Ex. K, DRC Files 96, 100-34, 381-405). When his condition became exacerbated in January 2001 he was transferred for 3 months to Oakwood Correctional Facility, which provides comprehensive inpatient psychiatric treatment. (DRC Files 381-83, 400-05). Sean has been prescribed several forms of antipsychotic medications while he has been in prison, including Risperdal and Prolixin. (DRC Files 111, 134). Dr. G.S. Reudisueli, a psychiatrist who examined Sean upon his admission to Oakwood (just over 4 years after the offense occurred), remarked that Sean's symptoms were "consistent with onset of paranoid schizophrenia during the past few years, although there were probably some prodromal symptoms during his adolescent years." (DRC Files 383). According to Dr. Stinson, while Sean's condition has worsened since the offense, "that he is currently severely mentally ill, diagnosed with Schizophrenia . . . and mostly out of contact with reality is not an amazing coincidence; it was a predictable, if not inevitable course . . ." (Stinson Aff. 36).

Sean Carter's persistent, serious mental illness has such an impact on his reasoning, judgment, and impulse control that he should be ineligible for the death penalty. Like a mentally

retarded person or a juvenile, Sean should be held less culpable for his actions because of the significant cognitive and psychological limitations imposed upon him by his serious mental illness. The reliability and fairness of his capital proceedings were undercut by his inability to participate meaningfully in his own defense; his outburst in front of the jury, his violent struggle with four deputies after lunging at the judge, and his refusal to be present for the trial and mitigation phases of the proceedings were all precipitated by his serious mental illness. The justifications of deterrence and retribution are inapplicable to Sean Carter, as his serious mental illness, and its devastating impact on his thought processing, reasoning, and insight, leaves him out of touch with reality and diminishes his level of culpability.

Under the Eighth Amendment's "evolving standards of decency," the State of Ohio could not execute Sean Carter if he were mentally retarded, or if he had committed the offense just six months early, when he was still seventeen. It could not do so because the deficits associated with mild mental retardation, or the documented immaturity and lack of responsibility in juveniles, would render him less morally culpable. Sean Carter is not mentally retarded and was eighteen years old when he committed his offense, but he was suffering from a serious mental illness. His mental illness manifested in early childhood, and his fragile mental state further destabilized during adolescence and young adulthood, including during the time of the offense. Like mild mental retardation and being a juvenile, serious mental illness reduces Carter's moral culpability for the crime of capital murder.

This court should find no principled distinction between executing Sean Carter and executing an offender with comparable deficits due to mental retardation or lack of maturity. This court should vacate Sean Carter's death sentence.

GROUND FOR RELIEF NINE

Sean Carter will not be competent and sane to be executed. Sean's execution while he is incompetent and insane, violates the Eighth and Fourteenth Amendments to the United States Constitution.

If Sean Carter does not prevail in these habeas proceedings, he will be too insane and incompetent to be executed. See Ford v. Wainwright, 477 U.S. 399 (1986). He will understand neither that he has been convicted of aggravated murder, nor that he is to be executed for the crime of that his penalty of death is relevant to his conviction. Because of Sean's mental health issues, he will be unable to meaningfully appreciate that he is going to die because he has been convicted of aggravated murder.

Sean Carter is currently severely mentally ill, diagnosed with Schizophrenia, exhibiting classic signs (even while denying having any mental health problems), largely unhelped by treatment, and mostly out of contact with reality. (Ex. A, Stinson Aff. 36). His intellectual abilities appear to have "arrested" and, in fact, deteriorated or declined from where Sean has been able to function in the past. (Ex. B, Gelbort Aff. 3).

Sean Carter's rights as guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution; the Eighth Amendment

protections against cruel and unusual punishment; and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, will be violated if he is executed while incompetent and insane.[1]

III. CONCLUSION AND REQUEST FOR RELIEF

For the reasons contained in the foregoing claims, Sean Carter respectfully requests that this Court issue a writ of habeas corpus directing the State of Ohio to provide him a new trial or, in the alternative, a new sentencing proceeding.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender

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Linda E. Prucha (#0040689)
Assistant State Public Defender
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s/Melissa J. Callais
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---

[1] Mr. Carter understands that presently, this claim is not ripe and is premature. However, in light of Martinez-Villareal v. Stewart, 118 F.3d 628 (9th Cir. 1997), he now raises this issue.

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Counsel for Sean Carter

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2005, a true copy of the foregoing **Amended Petition for Writ of Habeas Corpus** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access the filing through the Court's system.

s/Linda E. Prucha
Linda E. Prucha (#0040689)
Assistant State Public Defender

Counsel for Sean Carter

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SEAN CARTER,

Petitioner,

-vs-

MARGARET BRADSHAW, Warden

Respondent.

Case No. 3:02CV524
Judge Economus

Death Penalty Case
Filed: October 3, 2005

MOTION FOR COMPETENCY DETERMINATION AND TO STAY PROCEEDINGS

Petitioner Sean Carter, by and through counsel, moves this court for a competency determination of Mr. Carter and an order staying these proceedings while the competency determination is being completed. The reasons for this request are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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Ohio Public Defender

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Linda E. Prucha (#0040689)

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MEMORANDUM IN SUPPORT

In Rohan ex rel. Gates v. Woodford, 334 F.3 803, 812-13, 818 (9th Cir. 2003), the Ninth Circuit Court of Appeals recognized that the statutory right to counsel in capital cases incorporates a concomitant right to competence for all proceedings, including proceedings seeking collateral relief.[1]

As explained in detail below and in the attached supporting documentation, serious questions regarding Mr. Carter's competency have

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[1] The United States Supreme Court has not determined whether such a right exists. See, e.g., Mines v. Dretke, 118 Fed. Appx. 806, 811-12 (5th Cir. 2004); 2004 U.S. App. LEXIS 26259, **15.

arisen. Mr. Carter, through counsel, moves this court for a competency determination.

1. Competence is a Prerequisite to Pursuit of Habeas Relief.

In Rohan, the Ninth Circuit held that "federal habeas corpus has a particularly important role in promoting fundamental fairness in the imposition of the death penalty" and that "meaningful assistance of counsel is essential to secure federal constitutional rights." 334 F.3d at 813. Rohan framed the competency inquiry in terms of petitioner's ability to assist counsel. Counsel's ability to effectively present habeas claims "depends in substantial measure" on the client's ability to communicate. Id.

Rohan found the right to competence "firmly established" in common law. 334 F.3d at 807. The court pointed out that William Blackstone, Sir Matthew Hale, and Sir John Hawles, all tied "competence to capacity for rational communication." 334 F.3d at 808. Additionally, the Rohan court found that the historical right to competence extended beyond the jury verdict and extended through to entry of judgment and execution. Id.

Rohan recognized that while the right to competence at trial is broad, and the right to competency at execution is narrow (one must only be aware of the punishment they are "about to suffer and why they are to suffer it." Ford v. Wainwright, 477 U.S. 399, 422 (1986)), the right to competence to pursue collateral review has not been conclusively resolved. 334 F.3d at 810. However, the court noted that under Ford, a prisoner may be executed "even if he lacks capacity to communicate exonerating

information." 334 F.3d at 812. Where a petitioner may be executed before he is ever able to rationally communicate, the need to assist counsel in presenting his claims in his habeas proceedings is critical. A petitioner also suffers prejudice by being forced to go forward with a habeas petition while incompetent because of the strict limits on successive petitions imposed by 28 U.S.C. § 2244. 334 F.3d at 812.

Rohan makes it clear that the pursuit of habeas relief cannot be accomplished where the petitioner is unable to rationally communicate with counsel .

> In capital cases, prisoners challenging their convictions or sentences in federal court have a right to assistance of counsel. See 21 U.S.C. § 848(q)(4)(B). This prescription reflects Congress's belief that 'federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." McFarland v. Scott, 512 U.S. 849, 859 (1994), and that meaningful assistance of counsel is essential to secure federal constitutional rights. Counsel's assistance, however, depends in substantial measure on the petitioner's ability to communicate with him. And if meaningful assistance of counsel is essential to the fair administration of the death penalty and capacity for rational communication is essential to meaningful assistance of counsel, it follows that Congress's mandate cannot be faithfully enforced unless courts ensure that a petitioner is competent.

334 F.3d at 812-13. Thus, competency and the ability to assist is a prerequisite to fair adjudications in capital habeas proceedings.

Rohan concluded that a right to competence at habeas it not a groundbreaking concept, citing Calderon v. U.S. District Court, 163 F.3d 530 (9th Cir. 1998) ("Kelly V") in which the Ninth Circuit granted equitable tolling of AEDPA due to petitioner's incompetence. To not do so could "eviscerate the statutory right to counsel." 334 F.3d at 814 (quoting Kelly V, 163 F.3d at 541). "The prisoner's incompetence is relevant, not because it impairs his decisionmaking, but because it prevents him from communicating information that he alone possesses." 334 F.3d at 816.

Rohan held that "if a court holds an entire trial while a defendant is incompetent, we don't review for harmless error by speculating what the defendant might have said. The error is structural . . . ." 334 F.3d at 818. Conducting "an entire habeas proceeding while a petitioner is incompetent is no different." Id. While a court can only speculate what an incompetent petitioner may have to contribute, that does not justify forcing him to proceed notwithstanding his incompetence; [t]hat prospect is difficult indeed to square with 'the humanity of the English law . . . ." Id.

2. Mr. Carter is incompetent and unable to assist habeas counsel.

Pursuant to this Court's grant of expert assistance to review medical records and evaluate Mr. Carter, Dr. Bob Stinson, a psychologist, reviewed Mr. Carter's available mental health records from

Mansfield Correctional Institution, as well as Oakwood Correctional Institution. Dr. Stinson met with Mr. Carter on June 6, 2005. He also talked with several of the correctional officers who interact with Mr. Carter on a daily basis.[2] Dr. Stinson concluded in his affidavit:

> "Based on all the information available to me and based on my personal observations and evaluation of Sean, it is my opinion that he currently has a severe mental illness known as Schizophrenia Paranoid Type—Continuous. His mental status is severely debilitated and he lacks insight into his severe mental illness and need for treatment. He is psychotic and out of touch with reality in many ways. I have very serious concerns about his ability to understand the nature and objective of the legal process that he is currently going through and I have even greater concern about his ability (or lack thereof) to assist his counsel in representing him through this legal process."

(Stinson Aff. 44). Dr. Stinson concluded, "[I]t is my opinion . . . [that] [b]ecause of his severe mental illness, [Mr. Carter] does not fully understand the nature and objective of the current legal proceedings

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[2] The affidavits of Dr. Stinson and Dr. Michael Gelbort have been submitted with the Motion to Expand the Record. Dr. Stinson's affidavit is Exhibit A; Dr. Gelbort's affidavit is Exhibit B. The Dept. of Rehabilitation and Correction files ("DRC Files") obtained from Mansfield Correctional Institution and Oakwood Correctional Institution are submitted as Exhibit K to the Motion to Expand the Record.

against him; and because of his severe mental illness, he is not currently capable of assisting his counsel in these legal proceedings." (Stinson Aff. 47).

On August 8, 2005, Dr. Michael Gelbort, a clinical neuropsychologist, evaluated Mr. Carter. Dr. Gelbort concluded that Mr. Carter's intellectual performance is now in the borderline mentally defective range of functioning. He found "notable impairment" when problem solving, reasoning, judgment, and insight were needed. "Intellectual abilities appear to have 'arrested' and, in fact, deteriorated or declined from where Mr. Carter has been able to function in the past." (Gelbort Aff. 2-3).

Dr. Gelbort noted that Mr. Carter's language skills are impaired. He presents with a mild to moderate dysarthria (pronunciation/enunciation: slurring, poor articulation, etc.), constricted prosody (cadence and speed delivery of the spoken utterance or word), and was found to be easily distractible. Mr. Carter acknowledged that he hears voices inside of his head when no one is around and that there are "two or three voices, mostly female" which intrude daily. (Gelbort Aff. 3).

Dr. Gelbort found that the auditory hallucinations do appear to interfere with Mr. Carter's ability to think effectively and efficiently and lead to some cognitive disorganization and a suppressing of his intellectual and cognitive processing. He comprehends more simplistic information but has difficulty with comprehension of that which is more complex in nature. He expresses himself in very basic ways but has limited higher level expressive skills. Comprehension was constricted. (Gelbort Aff. 3).

Tests of higher level reasoning, problem solving, and information all found mild to severe impairments. Processing speed for very easy to process information was mildly impaired with performance just below the fifth percentile. More complex reasoning and processing functions were below the second, and even below the first percentile. (Gelbort Aff. 3).

Dr. Gelbort found, "In both statistical and functional senses [Mr. Carter] is impaired, demonstrates significant cognitive defects, and does not have the requisite underlying neuropsychological abilities to act or behave in an adaptive and goal directed fashion at an independent level." Additionally, "he shows signs of significant and debilitating mental illness with a loosening of contact with reality and indications of auditory hallucinations. These are also disruptive to his cognitive functioning, as well as show impairment in interpersonal abilities." (Gelbort Aff. 3).

Mr. Carter's medical records from Oakwood and Mansfield Correctional Institutions document Mr. Carter's severe mental illness. In September, 1998, Dr. Seong Shim noted that Mr. Carter "might have typical schizophrenia which might take a chronic downhill process." (DRC Files 134).

In May, 2001, Dr. John Draeger described Mr. Carter as "very religiously preoccupied" and that "he does talk in ways that nobody understands. It is possible that he either hears things that I don't' hear or expects some type of telepathic communication." (DRC Files 111).

In August, 2001, Dr. Miles Oden noted that "it is very difficult to get information out of inmate Carter. He is very terse. Not that he is being uncooperative . . . He does not respond at all to open end questions." Mr. Carter had "some particular movements, such as his lips moving as if he were going to whisper something . . . He often looks inattentively at corners of the room. He gave the appearance of someone who is distracted by internal stimuli." (DRC Files 103).

In October, 2001, Dr. Oden noted that correctional officers reported that they heard occasional, loud, crazy-sounding laughter from Mr. Carter's cell, and that Mr. Carter "does seem extremely odd." He noted that Mr. Carter would only give yes and no answers. "He appears to be having a lot of negative psychotic symptoms." (DRC Files 101). Dr. Oden noted that Mr. Carter had long periods of laughter and broke out laughing several times during the course of an interview. Mr. Carter "stated the reason for his laughter was a secret. He moved his lips almost as if he were trying to whisper something to someone else in the room." (DRC Files 100).

In January, 2002, Dr. Oden noted that Mr. Carter was urinating on himself and on the floor. Mr. Carter was engaging in bizarre behaviors such as gorging on food so that he had food all over his body and face. His hygiene was deteriorating and he was ransacking his room. The staff described his cell saying "it looked like a wild dog had been let loose." Dr. Oden also noted that Mr. Carter "often does not answer questions and seems distracted." Dr. Oden concluded that "this inmate was too disorganized to

function even in the tightly structured setting of death row." At that time, Mr. Carter was transferred to Oakwood Correctional Institution. (DRC Files 96).

Oakwood records indicate that Mr. Carter was failing to keep up his personal hygiene, was increasingly isolated, not cooperating and appeared to be acting and talking bizarrely. He was felt to be somewhat paranoid. He laughed inappropriately and was religiously preoccupied; he spoke very little. Also, "[p]atient seems to have little awareness or understanding of what his medications are for." Although he denied currently hearing voices, he "repeatedly looks around or responds as if he is responding to voices." (DRC Files 381-82).

Mr. Carter's confusion about the habeas appeal process was noted by doctors at Oakwood. They noted, "[h]e continues to believe that he can only be executed if he volunteers to be executed and, therefore, feels that he is not at risk and does not need to appeal. He did not seem to understand at all the realities of his situation. . .." (DRC Files 404). While Mr. Carter's condition at Oakwood was deemed to be stabilized, it was noted that if he was not supervised and assisted with his self-care, and his medication compliance was not closely supervised, "he might fairly rapidly decompensate again." (DRC Files 405). In July of 2002, Mr. Carter was transferred back to Mansfield Correctional Institution.

In addition to the above information, the attached affidavit of counsel sets out counsel's concerns about Mr. Carter's competency and his ability to assist in his habeas proceedings.

3. Mr. Carter's assistance is essential.

Grounds for Relief in Mr. Carter's amended habeas petition raise claims as to ineffective assistance of counsel and Mr. Carter's absence from his own trial. Presentation of these claims requires Mr. Carter's assistance, something counsel believes Mr. Carter is unable to provide. Given these facts, a competency determination is essential.

Rohan recognized that communication with counsel is a prerequisite to a fair adjudication of federal habeas claims:

> ...[W]e hold that, where an incompetent capital habeas petitioner raises claims that could potentially benefit from his ability to communicate rationally, refusing to stay proceedings pending restoration of competence denies him his statutory right to assistance of counsel, whether or not counsel can identify with precision the information sought.

334 F.3d at 819. Mr. Carter's Traverse is due on December 2, 2005. To present his claims adequately, Mr. Carter's assistance is required but unavailable due to his incompetence.

4. Conclusion.

For the foregoing reasons, it is requested that this Court make a determination as to Mr. Carter's competency to proceed with these federal habeas proceedings. Further, it is requested that these proceedings be stayed pending the determination of competency.

Respectfully submitted,

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Counsel for Sean Carter

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SEAN CARTER,

Petitioner,

-vs-

MARGARET BRADSHAW, Warden

Respondent.

Case No. 3:02CV524
Judge Economus
Death Penalty Case
Dated: October 3, 2005

AFFIDAVIT OF LINDA E. PRUCHA

IN THE STATE OF OHIO :
: SS:
COUNTY OF FRANKLIN :

I, Linda E. Prucha, after being duly sworn according to law, state as follows:

1. I am an attorney with the Office of the Ohio Public Defender.

2. I am assigned to Carter v. Bradshaw, Case No. 3:02CV524.

3. I have represented Sean Carter since March, 2002.

4. I have been an attorney with the Office of the Ohio Public Defender for sixteen years. My case load consists exclusively of capital cases.

5. I have represented death row clients in state appellate proceedings, state post conviction proceedings, federal district court, and the Sixth Circuit Court of Appeals. I have also filed petitions for writ of certiorari in the United States Supreme Court.

6. I have been concerned about the mental status and competency of Sean Carter for several months. The following observations are based on my professional interactions with Mr. Carter.

7. At my first meeting with Mr. Carter, he signed an affidavit saying he wanted to proceed with his federal habeas petition.

8. At my second visit to Mr. Carter, he came out of his cell but laid down on the floor before he got to the attorney visiting room. He did not want to get up off the floor to participate in the visit. He was taken back to his cell.

9. Following that visit, my co-counsel, Siobhan Clovis, sent Mr. Carter a letter asking him questions about his case. Mr. Carter did not respond to the letter.

10. On my third visit to Mr. Carter, he did not want to visit with me but I asked the guards to tell him that the meeting was "very important" and to bring him out. Mr. Carter came to the visiting room but had difficulty keeping his eyes open. I

talked to him briefly but was not sure that he was hearing what I was saying or paying attention in any meaningful way. He told me that he "didn't care what happened" in his case. It was after this meeting that I asked Dr. Bob Stinson, a psychologist, to meet with and evaluate Mr. Carter. Dr. Stinson's affidavit has been submitted with the Motion to Expand the Record as Exhibit A.

11. At my visit, Mr. Carter's personal hygiene seemed poor. He appeared to have fuzz and dust in his hair. Mr. Carter did not appear to remember me or my previous visits to him.

12. Given the above referenced information, I have serious concerns about whether Sean Carter is competent to understand the issues in his case and to assist his counsel.

Further affiant sayeth naught.

s/Linda E. Prucha
Linda E. Prucha

Sworn and subscribed to me this 3rd day of October, 2005.

s/Kimberly S. Rigby, Attorney at Law
Notary Public, State of Ohio
My commission has no expiration date
Section 147.03 ORC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SEAN CARTER,

Petitioner,

-vs-

MARGARET BRADSHAW, WARDEN

Respondent.

Case No. 3:02CV524
Judge Economus

Death Penalty Case
Filed: June 23, 2008

AFFIDAVIT OF LINDA E. PRUCHA

IN THE STATE OF OHIO :
: SS:
COUNTY OF FRANKLIN :

I, Linda E. Prucha, after being duly sworn according to law, state as follows:

1. I am an attorney with the Office of the Ohio Public Defender.

2. I am assigned to Carter v. Bradshaw, Case No. 3:02CV524.

3. I have represented Sean Carter since March, 2002.

4. I have been an attorney with the Office of the Ohio Public Defender for nineteen years. My case load consists exclusively of capital cases.

5. I have represented death row clients in state appellate proceedings, state post conviction proceedings, federal district court, and the Sixth Circuit Court of Appeals. I have also filed petitions for writ of certiorari in the United States Supreme Court.

6. On April 30, 2008, my co-counsel Melissa Callais and I visited Sean Carter at Mansfield Correctional Facility.

7. Mr. Carter came to the meeting wearing a dirty shirt with his pants unzipped. Shortly after we started talking he asked about lunch, although it was only 10:30 a.m.

8. He would only speak in response to questions, and would answer with just a few words.

9. When asked about his trial, he said it was for an "insanity."

10. He was not able to talk about why he was transferred to Oakwood for a period of time. He said he talks to a "Chinese nurse" about his "medications."

11. When asked about his trial and his attorneys, his answers were "I don't know," or "I don't remember." He said he does not care about his case. He was not able to talk about his case or the issues.

12. He could not say what other inmates he talks to. He said he watches TV. When asked what

he watches on TV he said "nothing." He said he listens to "rock and roll" music.

13. He does not remember Dr. Stinson or Dr. Resnick. He said he remembers that Dr. Gelbort gave him some tests but he could not remember what the tests were for.

14. He said he did not know how the jurors decided the penalty at his trial.

Further affiant sayeth naught.

s/Linda E. Prucha
Linda E. Prucha

Sworn and subscribed to me on this 23rd day of June, 2008.

s/Teri Slack
Notary Public
My commission expires
April 9, 2012

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 11-218

In the Supreme Court of the United States

TERRY TIBBALS, Warden,

Petitioner,

v.

SEAN CARTER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

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CAPITAL CASE—NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. Do capital prisoners possess a "right to competence" in federal habeas proceedings under *Rees v. Peyton*, 384 U.S. 312 (1966)?

2. Can a federal district court order an indefinite stay of a federal habeas proceeding under *Rees*?

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B. The trial court found Carter competent. 5

C. A jury convicted Carter of murder and the trial court imposed a capital sentence. 6

D. The Ohio Supreme Court affirmed the convictions and sentence, and the Ohio courts denied post-conviction relief. 8

E. Following the Ninth Circuit's lead, the district court held that Carter had a "right to competence" in his habeas proceeding under 18 U.S.C. § 3599. 9

F. The Sixth Circuit held that Carter had a right to competence under *Rees v. Peyton* and stayed his petition indefinitely. 12

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A. Carter has no statutory right to competence in his habeas proceeding. 15

1. Section 4241 does not apply to federal habeas proceedings. 16

2. *Rees* did not recognize a right to competence in habeas proceedings. 18

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B. Because AEDPA restricts Carter's habeas proceeding to the state-court record, the district court has no discretion to stay his case. 24

C. AEDPA prohibits the indefinite stay of any habeas proceeding. 27

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OPINIONS BELOW

The Sixth Circuit's opinion, *Carter v. Bradshaw*, 644 F.3d 329 (6th Cir. 2011), is reproduced at Pet. App. 1a. The district court's opinion, *Carter v. Bradshaw*, 583 F. Supp. 2d 872 (N.D. Ohio 2008), is reproduced at Pet. App. 27a.

JURISDICTIONAL STATEMENT

The Sixth Circuit issued its opinion on May 26, 2011. The Warden filed his petition on August 17, 2011, invoking this Court's jurisdiction under 28 U.S.C. § 1254(1). This Court granted the Warden's petition on March 19, 2012.

STATUTORY PROVISIONS INVOLVED

Section 4241(a) of Title 18 provides:

> At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

Section 3599(a)(2) of Title 18 provides:

> In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

The Anti-Terrorism and Effective Death Penalty Act of 1996, Section 2254(d) of Title 28 of the United States Code, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

After Respondent Sean Carter confessed to raping and stabbing his adoptive grandmother, a jury convicted him of capital murder and the Ohio courts upheld his death sentence. Carter then filed a habeas petition, and the State of Ohio stood ready to defend the judgment and sentence of its state courts.

That was ten years ago, and, still, no federal court has examined the merits of Carter's habeas claims. Instead, the district court and the Sixth Circuit embraced a novel "right to competence" for prisoners in federal habeas actions. Because Carter is unable to understand the habeas proceeding or assist his habeas counsel, all proceedings must halt—potentially forever.

But a right to competence does not exist for habeas petitioners. It cannot be found in any statute, nor can it be divined from any of this Court's cases. In holding otherwise, the Sixth Circuit disregarded the plain language of a federal criminal statute, 18 U.S.C. § 4241, and mistook a terse statement in *Rees v. Peyton*, 384 U.S. 312 (1966), as a watershed ruling creating such a right.

Not only is there no *right* to competence in statute or case law, but the federal courts also lack discretion to postpone this habeas action due to Carter's incompetence. Because the Ohio courts adjudicated Carter's claims "on the merits," 28 U.S.C. § 2254(d) of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") "limit[s]" the federal habeas inquiry "to . . . the record before the state court." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). That restriction is critical. Even if Carter

regained competence, any new facts or information he might communicate would be "irrelevant" to the habeas proceeding. *Id.* at 1400. The Sixth Circuit's stay order—premised on the opposite belief that Carter could develop new evidence—is "[in]compatible with AEDPA's purposes." *Rhines v. Weber*, 544 U.S. 269, 276 (2005). It must be reversed.

Finally, an indefinite stay of proceedings is never appropriate, even in the rare case where § 2254(d) and *Pinholster* do not apply. Congress enacted AEDPA to "reduce delays in the execution of state and federal criminal sentences." *Rhines*, 544 U.S. at 276 (citation omitted). Recognizing that purpose, this Court has already indicated that a habeas "petition should not be stayed indefinitely." *Id.* at 277.

For these reasons, the Court should reverse the Sixth Circuit's judgment and remand the case so that the district court may finally examine the merits of Carter's habeas petition.

STATEMENT OF THE CASE

A. Carter raped and murdered his adoptive grandmother.

In September 1997, after serving a jail sentence, Carter returned to the home of his adoptive grandmother Veader Prince. *State v. Carter*, 734 N.E.2d 345, 347 (Ohio 2000). Prince and her son discovered Carter, told him "that he wasn't allowed to come back here," and gave him a set of car keys. *Id.* at 348. Carter left, but returned to the house later that night. Finding the front door locked, he climbed in through a bedroom window. *Id.* at 349-50.

Carter encountered Prince, who again instructed him to leave. When Prince "tried to push him out the door," Carter "started to beat her." *Id.* at 350. He then raped Prince anally and stabbed her with a kitchen knife. An autopsy indicated that Prince suffered eighteen stab wounds, blunt force trauma to the face, and a severed aorta. A DNA test also matched semen in her rectum to Carter. *Id.* at 349.

To cover up the murder, Carter piled clothes over Prince's body, moved furniture to hide blood stains, turned on the water in the bathroom, placed a chicken on the stove, and penned a note ("Took Sean to the hospital"). Carter then changed his bloody clothes, took $150 from Prince's purse, and stole a car from the driveway. *Id.* at 350.

The next day, Prince's daughter and son visited the home, but could not find their mother. Returning that evening, they located Prince's dead body in the basement and called police. *Id.* at 348.

Officers in Pennsylvania soon located Carter sleeping in the stolen car. They traced the car to Ohio and learned that Carter was wanted for questioning about Prince's murder. *Id.* at 349. Ohio authorities then traveled to Pennsylvania to interview Carter. After waiving his *Miranda* rights, Carter confessed, waived extradition, and returned to Ohio. *Id.* at 349-50.

B. The trial court found Carter competent.

A grand jury indicted Carter for aggravated murder, aggravated burglary, aggravated robbery, and rape. *Id.* at 350.

The trial court appointed Dr. Stanley Palumbo to examine Carter's competence to stand trial and held a competency hearing. *Id.* at 355. "With reasonable scientific certainty," Dr. Palumbo concluded that "Carter [wa]s competent to stand trial." *Id.* He testified that "Carter underst[ood] the nature of the proceedings against him and d[id] not suffer any gross mental disorder that would interfere with his ability to participate in his defense." *Id.* After the hearing, the court deemed Carter competent. *Id.*

Carter then entered an insanity plea, prompting the trial court to again examine Carter's competence to stand trial. It scheduled another hearing and three experts testified: The first, Dr. Stephen King, noted that Carter "exhibited bizarre behavior" and concluded that he "was not able to assist in his own defense" (although Dr. King admitted that his diagnosis "was a close call"). *Id.* The second expert, Dr. Palumbo, reaffirmed his earlier finding: Carter was competent, and "express[ing] anger and irritability with his attorneys." *Id.* at 356. A third expert, Dr. Robert Alcorn, reported that "Carter did not think his attorney was doing a very good job," but was "competent to stand trial." *Id.*

After this second hearing, the trial court again concluded that Carter was competent. *Id.*

C. A jury convicted Carter of murder and the trial court imposed a capital sentence.

The case proceeded to trial. During opening statements, Carter inquired "if he had to go through

trial, or could he just plead guilty." *Id.* at 356 n.3. After the trial court excused the jury, "Carter stated he did not want to attend the trial." *Id.* When "[t]he trial court indicated some concerns about [Carter] waiving his presence," "Carter lunged at the judge in order to be removed from the courtroom." *Id.*

After that incident, "Carter watched the remainder of the trial from another room by remote video." *Id.* And at the beginning of each day, "defense counsel would report to the court . . . that Carter still did not want to attend trial." *Id.*

At the close of the evidence, the jury convicted Carter of aggravated murder with death specifications, aggravated robbery, rape, and criminal trespass. *Id.* at 350.

Before the penalty phase, the trial court appointed a fourth expert—Dr. Sandra McPherson—to evaluate Carter. Dr. McPherson indicated that "Carter's IQ was in the normal range," but that his "areas of functioning were below par." *Id.* at 360. She also concluded that Carter "did not have a mental disease or defect that substantially affected his conduct," but did "ha[ve] the genetic potential for schizophrenia." *Id.*

At the penalty phase, the defense presented evidence of Carter's history, character, and background, and called a psychologist who had evaluated Carter as a child. *Id.* at 359. The jury recommended a death sentence, which the trial court imposed. *Id.* at 350.

D. The Ohio Supreme Court affirmed the convictions and sentence, and the Ohio courts denied post-conviction relief.

On direct appeal, Carter challenged the trial court's competency finding. The Ohio Supreme Court rejected that claim: "The trial court's findings of fact fail to support Carter's claim that the court's decision was unreasonable, arbitrary, or unconscionable." *Id.* at 356.

The Ohio Supreme Court also rejected Carter's objections to the grand jury's indictment, the jury instructions, the prosecutor's statements at trial, trial counsel's performance, the appellate review process, the constitutionality of the death penalty, and the constitutionality of lethal injection. It then affirmed Carter's convictions and sentence.

Carter sought post-conviction relief in state court. He claimed that his attorneys failed to "challenge the sufficiency of the indictment; adequately prepare for the penalty phase of his trial; and, fully present evidence of his incompetence to stand trial." *State v. Carter*, No. 99-T-133, 2000 Ohio App. Lexis 5935, at *6 (Ohio Ct. App. Dec. 15, 2000). The trial court and the Ohio court of appeals rejected these claims on their merits.

The Ohio Supreme Court denied review. See *State v. Carter*, 746 N.E.2d 612 (Ohio 2001).

E. Following the Ninth Circuit's lead, the district court held that Carter had a "right to competence" in his habeas proceeding under 18 U.S.C. § 3599.

In 2002, the Ohio Public Defender filed an ex parte motion, seeking a mental-health examination of Carter. Carter "ha[d] declined all offers to meet with representatives of the Office," giving them reason to believe that he had "decided to waive further review of his case and volunteer for execution." J.A. 21. The Public Defender also sought access to Carter's prison records. The district court granted both requests. See Orders, *Carter v. Yanai*, No. 02-cv-524 (N.D. Ohio) (Docs. 10 & 11).

The Ohio Public Defender then filed a habeas petition on Carter's behalf. When the Warden expressed concern about the Public Defender's capacity to file the petition, Carter submitted an affidavit, attesting that he "want[ed] to continue to pursue [his] appeals" and that he "want[ed] [his] attorneys to represent [him]." J.A. 24.

Over the next three years, Carter sought discovery on his claim that he was incompetent to stand trial—seeking depositions of trial counsel and the trial court's mental-health experts, funding for medical exams and experts, and the appointment of a neuropsychologist. The trial court granted those requests. See Orders, *Carter v. Bradshaw*, No. 02-cv-524 (N.D. Ohio) (Docs. 94 & 117).

Carter amended his habeas petition, first in 2003, then in 2004, and again in 2005. He alleged incompetency at trial; ineffective assistance during the penalty phase; prosecutorial misconduct;

unconstitutional jury instructions; ineffective assistance at the guilt phase; and ineffective assistance on direct appeal. Carter also claimed that Ohio's lethal injection methods were unconstitutional, that the Eighth Amendment prohibited the execution of a prisoner with "serious mental illness," and that he was incompetent under *Ford v. Wainwright*, 477 U.S. 399 (1986). J.A. 28-89.

With his third amended petition in 2005, Carter filed a motion for a competency determination and to stay proceedings. J.A. 90. He urged the district court to follow the Ninth Circuit's decision in *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003), and recognize that capital prisoners have a "right to competence" in their federal habeas proceedings under 18 U.S.C. § 3599(a)(2). J.A. 91.

On the question whether "Carter has a right to be competent during habeas proceedings," the district court located "no binding authority." J.A. 16. But it found the *Rohan* decision "persuasive" and ordered a competency hearing. *Id.*

At the hearing, Carter's expert, Dr. Robert Stinson, testified that Carter had "schizophrenia," a "depressive disorder," and "a personality disorder." Pet. App. 30a. The condition, Dr. Stinson said, "distorts his inferential thinking," "affect[s] . . . his language and communication abilities," and prevents him from developing "a factual understanding of the proceedings." Pet. App. 30a-31a. Dr. Stinson agreed that "Carter could communicate with his attorneys,"

but indicated that "his schizophrenia renders him an 'unreliable historian.'"[1] Pet. App. 32a.

Carter's second expert, Dr. Michael Gelbort, stated that Carter's "thinking skills are fragmented and distracted." Although Carter could offer "basic assistance," Dr. Gelbort concluded that "it's not worth a whole lot of time or effort on his attorneys' part because his cognitive capabilities are so limited." Pet. App. 33a.

The Warden's expert, Dr. Phillip Resnick, agreed that Carter has "chronic undifferentiated schizophrenia." Pet. App. 34a. But Dr. Resnick testified that Carter understood the nature of his murder conviction and punishment: "[I]n my view, he meets the minimum standard because he can speak rationally and convey the information." Pet. App. 35a. Dr. Resnick further indicated that Carter "can convey the basic information, but . . . his illness does not permit him to give a rich description." *Id.*

Applying *Rohan*, the district court concluded that several of Carter's claims—he was incompetent at trial, and his attorneys were ineffective in pursuing that claim—"potentially could benefit from Carter's assistance." Pet. App. 42a-43a. The court then weighed the three expert opinions: Although Carter's capacity to understand his position and the habeas proceedings was "debatable" and "a difficult decision," his "diminished . . . ability to communicate with counsel" was "clear-cut." Pet. App. 45a. Under *Rohan*, the court found "that Carter [wa]s

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[1] Dr. Stinson updated his report in 2008, indicating that "Carter's mental condition ha[d] deteriorated." Pet. App. 35a.

incompetent to proceed with this federal habeas litigation." Pet. App.47a.

The district court then crafted a remedy: It "dismisse[d] without prejudice" the habeas petition and "prospectively toll[ed] the one-year statute of limitations set forth in 28 U.S.C. § 2244(d) . . . until such time as . . . Carter is competent to proceed with his federal habeas litigation." Pet. App 53a.

F. The Sixth Circuit held that Carter had a right to competence under *Rees v. Peyton* and stayed his petition indefinitely.

On appeal, the Sixth Circuit agreed with the district court's bottom-line ruling recognizing a right to competence, but not its analysis or remedy. The court did not endorse a "right to competence" under *Rohan* or 18 U.S.C. § 3599. Instead, the Sixth Circuit held that *Rees v. Peyton*, 384 U.S. 312 (1966), recognized "a statutory right to competence" for "[f]ederal habeas petitioners facing the death penalty." Pet. App. 4a. The court explained that *Rees* extended 18 U.S.C. § 4241—the statute discussing a federal criminal defendant's competence at trial—to capital habeas proceedings. Pet. App. 5a. Under *Rees*, the Sixth Circuit said, the prisoner must "be competent enough to (1) understand the nature and consequences of the proceedings against him, and (2) assist properly in his defense." Pet. App. 6a.

Because "Carter had refused to meet with his attorneys to discuss collateral attacks on his conviction," and because he "suffered from multiple psychological disorders affecting his abilities to relay facts to his counsel and communicate in detail," the

Sixth Circuit affirmed the district court's incompetency finding. Pet. App. 8a. *Id.*

But the Sixth Circuit said "it was improper for the district court to dismiss Carter's petition and prospectively toll the AEDPA statute of limitations." Pet. App. 11a. Instead, for a remedy, the Sixth Circuit followed the Ninth Circuit's path in *Rohan*—"habeas proceedings should be stayed until the petitioner is found to be competent." Pet. App. 14a.

The Sixth Circuit instructed the district court to stay proceedings indefinitely as to Carter's ineffective assistance claims. Pet. App. 15a. As to the remaining claims, the Sixth Circuit directed the court "to determine whether Carter's assistance is essential to their full and fair adjudication." *Id.* If "Carter's other claims might possibly be litigated without his assistance," Pet. App. 13a, the Sixth Circuit instructed the district court to appoint a next friend to litigate on Carter's behalf.

Judge Rogers dissented. He argued that the panel's decision "allows habeas petitioners to prevent States from enforcing their judgments, potentially forever, on the grounds of a nonexistent right to competency in habeas proceedings." Pet. App. 15a-16a. That right, he said, "has no basis in the Constitution or federal statutes." Pet. App. 16a.

This Court granted certiorari. It also accepted a related case, *Ryan v. Gonzales*, No. 10-930.

SUMMARY OF ARGUMENT

A prisoner's mental state is relevant to the post-conviction process in several ways: It can excuse an untimely habeas petition. See *Riva v. Ficco*, 615 F.3d 35, 40 (1st Cir. 2010). It can justify the appointment of a "next friend" to litigate on the prisoner's behalf. See *Whitmore v. Arkansas*, 495 U.S. 149, 162 (1990). And it can of course halt the prisoner's execution. See *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

The question here is whether a capital prisoner like Carter can file a habeas petition in federal court, allege incompetence, and secure an indefinite stay of his proceeding. He cannot.

First, prisoners have no statutory right to competence in pursuing their habeas claims. The provision cited by the Sixth Circuit, 18 U.S.C. § 4241, is far off base. That statute applies only to *federal* criminal defendants, and even then, only defendants who are on trial or released on probation. A state prisoner convicted of a capital offense does not meet that definition.

Second, *Rees v. Peyton*, 384 U.S. 312 (1966), does not confer a "right to competence" on prisoners pursuing a federal habeas petition. The Court's opinion does not refer to such a right, the historical record confirms that the Court did not recognize such a right, and the Court has declined to apply such a right in later cases.

Third, not only does no statute or case compel a stay, but any competency-related stay of this habeas proceeding would be an abuse of the district court's discretion to issue stays. Because the Ohio

courts rejected Carter's claims "on the merits," 28 U.S.C. § 2254(d), AEDPA restricts the federal courts to "the record that was before the state court." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). Competent or not, any new facts or evidence Carter might now reveal would have "no bearing" on this record-based inquiry. *Id.* at 1400. For that reason, Carter's present communication deficits cannot justify delay of his case.

And even if Carter could circumvent the evidentiary limitations of § 2254(d) and *Pinholster*, AEDPA condemns the *indefinite* stay of his habeas action. Congress passed AEDPA to "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Rhines v. Weber*, 544 U.S. 269, 276 (2005) (citation omitted). In light of that objective, this Court has affirmed that a habeas "petition should not be stayed indefinitely." *Id.* at 277.

The Sixth Circuit had neither the authority nor the discretion to order an indefinite stay of this proceeding based on Carter's incompetence. The Court should reverse the judgment below.

ARGUMENT

A. Carter has no statutory right to competence in his habeas proceeding.

The Sixth Circuit recognized "a statutory right for the [habeas] petitioner to be competent enough to (1) understand the nature and consequences of the proceedings against him, and (2) assist properly in his defense." Pet. App. 6a. It offered two sources for that holding: 18 U.S.C. § 4241 and *Rees v. Peyton*, 384 U.S. 312 (1966). The text and history of Section

4241 and *Rees* demonstrate that no such right exists.[2]

1. Section 4241 does not apply to federal habeas proceedings.

"At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence," 18 U.S.C. § 4241(a) authorizes the prosecutor, defense counsel, or the district court to seek "a hearing to determinate the mental competency of the defendant." At that hearing, the court must determine whether "the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." *Id.* § 4241(d).

But Section 4241's opening sentence makes clear that the statute governs two discrete phases in

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[2] Carter has never asserted a *constitutional* right to competence, and for good reason. As the Sixth Circuit noted, "[f]ederal habeas petitioners facing the death penalty for state criminal convictions do not enjoy a constitutional right to competence." Pet. App. 4a; accord *United States v. Mandycz*, 351 F.3d 222, 225 n.1 (6th Cir. 2003) ("[A]t present, mental incompetency is only recognized as a defense to trial in criminal proceedings."). See also *Rector v. Clark*, 923 F.2d 570, 572 (8th Cir. 1991) (rejecting an Eighth Amendment "ability-to-assist counsel" claim in federal habeas proceeding); *O.K. v. Bush*, 344 F. Supp. 2d 44, 56 (D.D.C. 2004) ("[T]he prohibition on the prosecution of an incompetent defendant, and the accompanying right to a determination of mental competence, cannot be said to extend to habeas proceedings.").

a federal criminal proceeding: (1) "after the commencement of a prosecution for an offense and prior to the sentencing of the defendant," and (2) "after the commencement of probation or supervised release and prior to the completion of the sentence." *Id.* § 4241(a); accord *Blair v. Martel*, 645 F.3d 1151, 1155 (9th Cir. 2011) ("By its own terms, § 4241 does not apply unless a federal criminal defendant is on trial or is released on probation."); S. Rep. No. 98-225, at 233 (1983) (Section 4241 "deal[s] exclusively with the determination of the mental competency of the defendant to stand trial.").

Carter cannot invoke Section 4241 by any stretch. For one thing, he is not a federal criminal defendant. Nor is he on trial or on probation. Rather, he is a state prisoner attempting to vacate his state-court conviction and sentence in a federal habeas action under 28 U.S.C. § 2254. By its terms, Section 4241 does not apply to a capital postconviction proceeding—a civil action that is neither "prior to the sentencing of the defendant," nor "after the commencement of probation or supervised release." Accord Amicus Br. of the United States at 10, *Ryan v. Gonzales*, No. 10-930 (Feb. 9, 2012) ("[T]he federal statute governing competency determinations, 18 U.S.C. § 4241, does not apply to capital postconviction proceedings.").

Lest any confusion remain, the statute's definition of "incompetency" confirms its limited scope. Under Section 4241(d), a district court must determine whether a defendant "is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." The law is therefore tied to the defendant's

criminal proceeding ("proceedings *against* him") and his capacity to answer the criminal charges ("to assist properly in *his defense*").

This definition of "incompetency" cannot apply to a habeas proceeding. A federal habeas action is not a "proceeding against" the prisoner. Rather, it is the prisoner who files a civil action against the government. What is more, the prisoner does not advance a "defense" in a habeas action. He presents a petition to a federal court, and he bears the burden of proving that his conviction and sentence violate federal law.

This case falls squarely outside the bounds of Section 4241, which affords protections to defendants at a federal criminal trial, not to state prisoners in a federal habeas proceeding. The Sixth Circuit had no basis for applying the statute here.

2. *Rees* did not recognize a right to competence in habeas proceedings.

When endorsing a "statutory right to competence" for habeas petitioners, the Sixth Circuit did not bother with Section 4241's text or history. It relied entirely on *Rees v. Peyton* to "apply[] section 4241 to habeas actions." Pet. App. 6a. The court erred. *Rees* did nothing of the sort.

In *Rees*, the lower courts rejected a capital inmate's habeas petition, and the prisoner's counsel filed a petition for certiorari with this Court. About a month later, Rees attempted to withdraw his petition, but his counsel indicated that "he could not conscientiously accede to these instructions without a psychiatric evaluation." 384 U.S. at 313. The Court responded that "it [wa]s ultimately the

responsibility of this Court to determine" "[w]hether or not Rees shall be allowed in these circumstances to withdraw his certiorari petition." *Id.* The Court then directed the district court to determine "whether [Rees] ha[d] capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or . . . whether he [wa]s suffering from a mental disease, disorder, or defect which may substantially affect his capacity." *Id.* at 314. It further instructed the court to perform "psychiatric and other appropriate medical examinations." *Id.* (citing as a "cf." 18 U.S.C. §§ 4244-4245 (1964)).[3]

After the district court found the prisoner incompetent, this Court—in a one-sentence order—directed that the petition for certiorari be "held without action." *Rees v. Peyton*, 386 U.S. 989 (1967). Decades passed. The petition remained held until Rees's death in 1995, when the Court dismissed it. See *Rees v. Superintendent of the Va. State Penitentiary*, 516 U.S. 802 (1995).

The Court's terse, unexplained orders shed little light on its rationale. Lacking such direction, most courts confine *Rees* to situations "where a death-row inmate elects to *abandon* further legal proceedings." *Smith v. Armontrout*, 812 F.2d 1050, 1057 (8th Cir. 1987) (emphasis added); accord *Michael v. Horn*, 459 F.3d 411, 420 (3d Cir. 2006); *Henderson v. Haley*, 353 F.3d 880, 893 (11th Cir. 2003); *Brewer v. Lewis*, 989 F.3d 1021, 1026 n.4 (9th Cir. 1993); *Rumbaugh v. Procunier*, 753 F.2d 395, 398 (5th Cir. 1985).

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[3] This statute is now recodified at 18 U.S.C. § 4241 (2012).

This approach is reasonable. *Rees* addressed a capital prisoner's competence to *terminate* his habeas proceeding—that is, forfeit his last chance at reversing his conviction and capital sentence. Given the serious nature of this request to abandon litigation, it is sensible that a court would want to ensure that the prisoner "ha[d] capacity to appreciate his position and make a rational choice." *Rees*, 384 U.S. at 314.

But *Rees* did not involve the situation here—a prisoner's competence to *assist* in his federal habeas proceeding. The Sixth Circuit nevertheless expanded *Rees* to this circumstance, finding "a statutory right for the prisoner to be competent" throughout his proceeding. Pet. App. 6a.

The Sixth Circuit was wrong. *Rees* carefully avoided any recognition of a new statutory right. In fact, the opinion performed no statutory analysis whatsoever. *Rees*'s lone allusion to a federal statute is a "Cf." citation to Section 4241's predecessor—18 U.S.C. §§ 4244-4245 (1964). As shown above, however, there is no way these provisions govern federal habeas proceedings. At most then, the Court was making a suggestion that the district court might follow the procedural provisions at its competency hearing. But any suggestion that this Court used a "Cf." citation, unaccompanied by explanation, to endorse a novel and sweeping statutory right for habeas petitioners is implausible on its face. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 n.6 (1995) ("[T]he unexplained silences of our decisions lack precedential weight."). And even if the *Rees* Court assumed the existence of a statutory right (and it did not), "such assumptions . .

. are not binding in future cases that directly raise the question[]." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990).

In urging an expansive reading of *Rees*, Carter references this Court's later orders. Once the district court found Mr. Rees incompetent, the Court "held" the case "without action" until his death in 1995. *Rees*, 386 U.S. at 989. Carter urges the same disposition here—a "stay[] . . . until Carter can provide the necessary assistance." Opp. to Cert. at 5; see also *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 815 (9th Cir. 2003) ("The record in *Rees II* shows that incompetence is grounds for staying habeas proceedings.").

This argument reads much more into the Court's actions than the record justifies. After the district court found Mr. Rees incompetent, the Chief Justice, a member of the Court, or the Clerk proposed the idea of an indefinite stay. See Mem. from the Clerk of Court to the Chief Justice, *Rees v. Peyton*, No. 9 Misc. (Mar. 31, 1967) (Library of Congress WJB B148F3) (attached as Appendix). After conferring with counsel for Mr. Rees and for Virginia, the Clerk reported that "counsel for both parties do not really present any objection to the procedure proposed in the case, but neither of them accepts it with enthusiasm." *Id.* Ten days later, the Court entered its one-line order staying the case.

This record reveals that the Court's stay of the *Rees* case was, at most, a judicially negotiated settlement. Once the district court found the prisoner incompetent, counsel for Virginia acceded to the indefinite stay. That resolution, even if appropriate under the circumstances of *Rees*,

provides no rule of decision for future cases. See *High Country Home Health v. Thompson*, 359 F.3d 1307, 1314-15 (10th Cir. 2004) ("[S]ettlement agreements have no precedential weight.").

Finally, if *Rees* were as monumental as the Sixth Circuit believed, then it should enjoy greater prominence. Yet this Court has never penned a sequel to *Rees*, despite having the opportunity to do so.[4] A survey of the lower courts reveals the same. Between 1966 and 2011, no court invoked *Rees* or Section 4241 to stay a capital habeas proceeding.

This silence is telling. Either (1) *Rees* recognized a broad and powerful new right for capital prisoners and it has taken forty-five years for someone to notice; or (2) the Sixth Circuit misinterpreted the decision. The latter explanation is far more likely.

In all, the Court's unexplained orders, irregular procedures, and steadfast refusal to repeat the *Rees* experiment point to one conclusion: The *Rees* Court did not recognize a broad and novel right to competence in habeas proceedings. The Sixth Circuit erred in holding otherwise.

3. No other statute affords such a right.

To be fair, Carter himself never waved the banner of Section 4241 or *Rees* in the lower courts—

---

[4] On at least two occasions, capital prisoners have alleged serious mental deficits in petitions for certiorari to this Court. See *Bedford v. Collins*, 130 S. Ct. 2344 (2010); *Rector v. Bryant*, 501 U.S. 1239 (1991). Despite those conditions, the Court did not stay consideration of their cases and order competency hearings. It instead denied certiorari.

the Sixth Circuit carved that innovative path on its own. And Carter has candidly acknowledged that "[t]he United States Supreme Court has not determined whether such a right [to competence] exists" in federal habeas proceedings. J.A. 91 n.1. Carter instead located a right to competence in 18 U.S.C. § 3599 (see J.A. 91-94)—following the Ninth Circuit's lead in *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003).[5]

Because the Court will address this issue in *Ryan v. Gonzales*, No. 10-930, the State of Ohio will not belabor it, but stresses three points in support of the State of Arizona's position:

First, Section 3599 confers a right to counsel and supplies an exhaustive list of instructions and specifications for appointed counsel in capital habeas proceedings. At no point does the statute define any other rights for the prisoner—including a right to competence.

Second, the Ninth Circuit invoked "[t]he right to competence . . . at common law" to inform its interpretation of Section 3599. *Rohan*, 334 F.3d at 807. This was error. "[S]tatutes should be interpreted consistently with the common law" only if the "statute . . . clearly covers a field formerly governed by the common law." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010). A right-to-*counsel* statute and a common law right-to-*competence* rule cover different fields. The latter cannot guide an interpretation of the former.

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[5] This provision had been codified in 21 U.S.C. § 848(q)(4)(B).

Third, the Ninth Circuit believed that the statutory right to competence was "implied" in the prisoner's statutory right to counsel under Section 3599. *Rohan*, 334 F.3d at 813. But courts have always treated the right to counsel and the right to competence as separate. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court announced a Sixth Amendment right to counsel at trial. Three years later, in *Pate v. Robinson*, 383 U.S. 375 (1966), the Court recognized a due process right to competence at trial—and did so without any mention of *Gideon*. If the right to competence is implicit in the right to counsel, as the Ninth Circuit assumed, then the *Pate* decision was unnecessary. *Gideon* would have already supplied the right.

As the Sixth Circuit did below, the Ninth Circuit in *Rohan* spun a statutory "right to competence" from whole cloth. Nothing in Section 3599's text or structure suggests such a right.

B. Because AEDPA restricts Carter's habeas proceeding to the state-court record, the district court has no discretion to stay his case.

Although no statute or precedent from this Court *mandates* a stay of a habeas proceeding when the prisoner is incompetent, there remains the question whether a district court would have *discretion* to order such a stay. For Carter, AEDPA supplies the answer, and the answer is "no."

District courts "have authority to issue stays" of habeas proceedings, but AEDPA "circumscribe[s]" that authority. *Rhines v. Weber*, 544 U.S. 269, 276

(2005). Any decision to stay a habeas action "must . . . be compatible with AEDPA's purposes." *Id.*

Any competency-related stay of Carter's proceeding would be *incompatible* with AEDPA because 28 U.S.C. § 2254(d) and *Pinholster* are operative in his case. The Ohio courts denied Carter's claims "on the merits."[6] 28 U.S.C. § 2254(d). To obtain relief under AEDPA, Carter must establish that those denials were "contrary to" or "an unreasonable application of" this Court's precedents, or were "based on an unreasonable determination of the facts . . . in the State court proceeding." *Id.* § 2254(d)(1)-(2).

When resolving those questions, the federal courts are confined to the state-court record. See *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 & 1400 n.7 (2011) ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."); ("§ 2254(d)(2) .... also is plainly limited to the state-court record."). This means that even if Carter regains competence, any new evidence he might communicate to his attorneys would never see the light of day. The district court would be "*barred* from considering [it]." *Id.* at 1411 n.20 (emphasis added).

---

[6] The Ohio Supreme Court rejected six claims on direct appeal—mental incompetence, prosecutorial misconduct, jury instruction error, guilt-phase ineffective assistance, unconstitutionality of lethal injection, and the Eighth Amendment. The court later denied an ineffective-assistance-of-appellate-counsel claim under Ohio. App. R. 26(B). The Ohio court of appeals rejected Carter's other ineffective assistance claims on state post-conviction review. Carter's final habeas claim under *Ford v. Wainwright*, 477 U.S. 399 (1986), is, by Carter's admission, "not ripe" and "premature." J.A. 88 n.1.

Instead, Carter's prospects for relief turn "on the record that was before the state court." *Id.* at 1400. Because counsel must tether their arguments to that record, Carter's mental deficits will not hinder their ability to litigate his claims. Carter has conceded this: "[C]ounsel does not need to be able to communicate with Carter about purely record claims." Carter's Reply to Supp. Br. on Competency at 6, *Carter v. Bradshaw*, No. 02-cv-524 (Doc. 196).

For that reason, a stay of proceedings until Carter regains competence advances no legitimate purpose. It is inconsistent with, and therefore forbidden by, AEDPA.

Arriving at the opposite conclusion, the Sixth Circuit explained that "[o]nly Carter knows critical parts of the factual basis for these [ineffective assistance] claims . . . and Carter 'is better positioned than anyone' to provide that evidence in support of his claim." Pet. App. 12a. Absent a stay, the Sixth Circuit feared, Carter's attorneys "would be forced to proceed through this action without the foundational facts that support Carter's claims." Pet. App. 13a.

The Sixth Circuit's rationale might carry some weight *if* Carter's habeas proceeding had a fact-finding component. But § 2254(d) and *Pinholster* dash that prospect, making clear that the district court's inquiry is confined to the state-court record. Any new evidence that Carter might reveal, were his condition to improve, would be "irrelevant" to the district court's record-based assessment of his claims. 131 S. Ct. at 1400.

At bottom, Carter's mental condition will have "no bearing" on his habeas action. *Id.* A federal

court therefore cannot delay adjudication on that basis.

C. AEDPA prohibits the indefinite stay of any habeas proceeding.

Even if one ignores 28 U.S.C. § 2254(d) and *Pinholster*'s operation in Carter's case, the Sixth Circuit's order was still improper because AEDPA does not allow the indefinite stay of a federal habeas action.

1. An indefinite stay of a habeas action is incompatible with AEDPA.

The writ of habeas corpus is "a swift and imperative remedy." *Fay v. Noia*, 372 U.S. 391, 400 (1963) (citation omitted). Expeditious adjudication benefits the prisoner, who is attempting to hold the "government . . . accountable to the judiciary." *Id.* at 402. But timely disposition also carries "special importance" for the States "in the context of a federal attack on a state conviction." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). "'Without finality, the criminal law is deprived of much of its deterrent effect,'" and "'the States' sovereign power to punish offenders'" is "frustrate[d]." *Id.* (citations omitted).

AEDPA codifies these first principles by "reduc[ing] delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). Prompt adjudication of a state prisoner's habeas claims "limit[s] the scope of federal intrusion into state criminal adjudications and . . . safeguard[s] the States' interest in the integrity of their criminal and collateral proceedings." *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

To be clear, "AEDPA does not deprive district courts of th[eir] authority" "to issue stays." *Rhines*, 544 U.S. at 276. Courts frequently authorize stays to allow exhaustion of state-court remedies or to await guidance from an appellate court. Courts also permit other postponements—extending a prisoner's briefing schedule, authorizing an amended petition, or, if fact-finding is permitted, expanding the discovery period. Although such acts slow the pace of the proceeding, they do not stop it.

And that distinction is crucial. "AEDPA's goal of streamlining federal habeas proceedings" requires the district court to, at a minimum, march toward disposition. *Id.* at 277. Without such a mandate, capital prisoners could "drag[] out indefinitely their federal habeas review" and "avoid execution of the sentence of death"—the very outcome that AEDPA forbids. *Id.* at 278.

Simply put, an indefinite stay is "[in]compatible with AEDPA's purposes." *Id.* at 276.

The Court in *Rhines* recognized this very principle. That case examined a practice whereby district courts would stay a "mixed" habeas petition while the prisoner returned to state court to exhaust several of his claims. Once the state proceedings ended, the district court would lift the stay and proceed to the merits. The "stay-and-abey procedure" allowed prisoners to satisfy AEDPA's strict exhaustion requirements without violating its one-year limitations period. *Id.* at 275-76.

While condoning the practice, the Court made clear that "the district court's discretion . . . is limited by the timeliness concerns reflected in

AEDPA." *Id.* at 277. It also issued an emphatic command: Habeas "petition[s] should not be stayed indefinitely." *Id.* Doing so "could frustrate AEDPA's goal of finality." *Id.* at 278.

2. AEDPA's prohibition on indefinite stays applies all the more here.

This case illustrates, and magnifies, the *Rhines* Court's unease with habeas stays. Carter has sought, and the Sixth Circuit has created, a powerful new mechanism for capital prisoners to forestall—and in many cases, frustrate—a State's enforcement of its criminal judgments.

First, the Court in *Rhines* feared that "[s]taying a federal habeas petition [could] frustrate[] AEDPA's objective of encouraging finality." 544 U.S. at 277. This case validates that concern. Carter filed his habeas petition in 2002, immediately raising concerns about his mental state. J.A. 18. After ten years of discovery, mental exams, collateral proceedings, and interlocutory appeals, the federal courts are no closer to resolving his claims.

Second, the Court expressed concern that capital prisoners, if given the chance, "could . . . drag[] out indefinitely their federal habeas review." *Rhines*, 544 U.S. at 278. The Sixth Circuit has now given every prisoner that chance: He need only display an inability to "understand the proceedings," "assist counsel," or "communicate in detail" to secure an extensive medical exam, a competency hearing, and a lengthy (if not indefinite) stay of his case. Pet. App. 8a.

Third, the Court emphasized the importance of comity and federalism in its habeas jurisprudence.

See *Rhines*, 544 U.S. at 273-74. The Sixth Circuit paid no heed to those principles. Consigning a prisoner's state-court judgment to indefinite nonresolution hardly constitutes "respect for the integrity of procedures 'employed by a coordinate jurisdiction within the federal system.'"[7] *McCleskey*, 499 U.S. at 493 (citation omitted).

All the rationales animating *Rhines* are present here. The same conclusion therefore applies: A habeas petition cannot "be stayed indefinitely." *Rhines*, 544 U.S. at 277.

This does not mean that a prisoner's mental state is irrelevant to his federal habeas proceeding. Federal law grants the district court discretion to authorize "experts" and "other services" for any prisoner—including incompetent prisoners—for services that "are reasonably necessary for [his] representation." 18 U.S.C. § 3599(f).

In those habeas cases where AEDPA does not restrict the inquiry to the state-court record, see *Pinholster*, 131 S. Ct. at 1401 ("[N]ot all federal habeas claims by state prisoners fall within the scope of § 2254(d)"), the district court could also grant an incompetent prisoner greater leeway in discovery. Using depositions, subpoenas, interrogatories, expert reports, and the like, counsel could identify all relevant facts supporting the prisoner's claims. See Rule 6, Rules Governing Section 2254 Cases (2010).

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[7] Indeed, an indefinite stay is far more destructive to federal-state relations than a habeas grant. A grant carries finality—a State can appeal the adverse judgment or retry the prisoner. An indefinite stay leaves the State in limbo—unable to proceed, unable to appeal, and unable to retry.

And assuming the rare case where *Pinholster* does not apply and the prisoner's participation is essential to a dispositive evidentiary question, "AEDPA would not necessarily foreclose . . . a stay for *a limited period*." Amicus Br. of the United States at 16, *Ryan v. Gonzales*, No. 10-930 (Feb. 9, 2012) (emphasis added). As discussed above, limited stays do not violate AEDPA. Just as a district court might extend a discovery period to allow counsel to unearth missing evidence or locate an unavailable witness, the court might stay its proceedings "to afford the prisoner the opportunity to regain his competence (either naturally or through medication)." *Id.* In each instance, a limited stay advances an important objective (ensuring an opportunity for full record development) while imposing minimum delay.

But some evidence may be irretrievable despite counsel's best efforts: Hard drives malfunction, forensic evidence degrades, and the memories of witnesses and parties recede. The Warden is aware of no authority authorizing an indefinite stay of a civil proceeding—much less a habeas proceeding—on the hope that now-irretrievable evidence will become accessible at some point in the future.

The same is true here. An incompetent prisoner's thoughts about his habeas claims—"locked away . . . in his memory," Pet. App. 12a—are akin to a missing piece of evidence. If they are irretrievable, the habeas action must proceed with the parties "do[ing] the best that is possible with the witnesses and testimony that are available." Pet. App. 22a (Rogers, J., dissenting).

This course reflects AEDPA's core purpose—"to reduce delays in the execution of state and federal criminal sentences." *Woodford*, 538 U.S. at 206. It also ensures the "state-court judgment[] . . . the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012). Most important, the timely adjudication of a habeas petition puts the prisoner to his burden—a demonstration that the state-court judgment "violate[s] . . . the Constitution or laws or treatises of the United States." 28 U.S.C. § 2241(c)(3). If a prisoner can obtain an indefinite stay, he can secure his desired relief—a suspension of his capital sentence—without ever needing to establish error in the state-court judgment.

For these reasons, the Court should again reject the proposition that federal courts maintain authority to "stay[] indefinitely" a habeas petition. *Rhines*, 544 U.S. at 277.

* * *

Carter's incompetence does not justify any stay (much less an indefinite stay) of his habeas proceeding. No statute grants him a "right to competence," and AEDPA withdraws any discretion of the courts to afford him that privilege.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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APPENDIX

APPENDIX

March 31, 1967

MEMORANDUM FOR THE CHIEF JUSTICE

Re: Rees v. Peyton, No. 9 Misc., October Term, 1966

Pursuant to instructions to the Clerk after the Court's Conference on March 24, I contacted Mr. Reno S. Harp, Assistant Attorney General of Virginia, and Mr. S. White Rhyne, counsel for Rees, and discussed with them the proposed disposition of this case.

Mr. Harp stated that, in the event the Court determines to hold the case without acting upon the petition, he has nothing to add to his recent memorandum. He stated that the principal disadvantage to the State would result if Mr. Rees regained competence and there should be a delayed reversal of the conviction at a time when it would be difficult for the State to use in a new trial evidence which is now available. Since the State certainly would not try Rees at a time when he would not be competent to defend himself, it seems that this delay results, not so much from the Court's failure to act, as from the underlying circumstances of the case. Mr. Harp also expressed a feeling that it is undesirable to have unresolved cases pending on the docket. However, he really had no substantial objection to the procedure suggested by the Court.

Mr. Rhyne also expressed the view that he has nothing to add to his prior memoranda except that he still believes it more desirable for the Court to grant the petition for certiorari and then hold the case on its docket. He has no suggestion as to the propriety of the Court considering the petition if it does not feel free to deny it as well as grant it.

In summary, counsel for both parties do not really present any objection to the procedure proposed in the case, but neither of them accepts it with enthusiasm.

Respectfully submitted,

Clerk

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RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 11-218

IN THE

Supreme Court of the United States

TERRY TIBBALS, Warden,

Petitioner,

v.

SEAN CARTER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

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CAPITAL CASE

QUESTION PRESENTED

Does a court have discretion to stay habeas proceedings when the petitioner's mental incompetence renders him unable to provide assistance that is necessary to the litigation of his claims?

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INTRODUCTION

The Anglo-American legal tradition has long recognized that the mental competence of a criminal defendant is essential to the fairness of all stages of the proceedings against him. The reason, articulated by Blackstone and other leading expositors of the common law, is intuitive: a defendant who is not of sound mind is unable to come forward with critical facts that could provide a defense or a ground for overturning his conviction. More recent developments pertaining to the review of criminal convictions, such as the Antiterrorism and Effective Death Penalty Act (AEDPA), have not diminished the force of the basic moral principle that mental illness should not deprive an individual of the opportunity to defend himself or seek relief from a criminal conviction.

Following in this tradition, the court below stayed the habeas corpus proceedings of respondent Sean Carter, a schizophrenic who was physically and mentally absent from his own trial proceedings and today suffers from hallucinations, confuses his own lawyers with the State's witnesses, and cannot remember the penalty-phase verdict at his trial. Both the district court and the court of appeals concluded that a suspension of the proceedings was warranted because Carter alleged substantial claims of constitutional error that could not be litigated without his competent assistance.

In this unusual circumstance, where a defendant's mental state prevented him from actively participating in his own defense at trial and now precludes him from providing necessary assistance on habeas review, staying the proceedings is a

reasonable exercise of a habeas court's inherent discretion in light of our legal tradition's longstanding concern for competence. This Court should affirm the narrow and fact-bound decision of the court of appeals remanding for a determination of the scope of the stay.

STATEMENT OF THE CASE

A. Facts and state proceedings

Sean Carter's current mental illness was presaged both by his family history of schizophrenia and a childhood characterized by instability and abuse. He was born to a schizophrenic mother, and his half-uncle and half-aunt likewise suffered from schizophrenia. Pet. App. 30a; J.A. 29; Trial Transcript ("T.T.") 563.

When Carter was two years old, Children's Services removed him from his biological mother's care after he was discovered tied to a couch, malnourished with an enlarged stomach. Pet. App. 30a; T.T. 3284.

Under the care of a foster mother, Ida Magee, Carter initially flourished in his first years in school. T.T. 3340-41. Nonetheless, a report from this period describes Carter as "schizoid-prone and at high risk of becoming detached from reality." Pet. App. 30a. Ms. Magee wanted to adopt Carter, but state regulations prevented her from doing so. J.A. 62.

Although Carter's case worker warned that he would have "great difficulty leaving his foster home" and was still "schizoid-prone," T.T. 3261, Carter was placed with a prospective adoptive family, the Smiths, at age eight, *id.* at 3289. Within months, Children's Services removed Carter from their

custody because he was verbally and physically abused. Pet. App. 30a.

Carter was then adopted by the Carter family. *Id.* Carter reported that he was physically abused by his adoptive father, and his adoptive mother threatened to cut off his penis. J.A. 61. Carter also stated that at some point during his childhood he was sexually abused. T.T. 3314.

In September 1997, approximately six months after his eighteenth birthday, Carter killed Veader Prince, his adoptive grandmother. He was charged with aggravated murder, aggravated burglary, aggravated robbery, and rape. J.A. 32.

Prior to Carter's trial, the court held a competency hearing, at which a court-appointed psychologist, Dr. Stanley Palumbo, opined that Carter was competent to stand trial, even though Carter indicated he suffered from auditory hallucinations, including hearing the voice of the devil. T.T. 22, 32-33. A sheriff's deputy testified that Carter was suicidal and had attempted to take his own life with a shank. *Id.* at 97. The defense did not call or introduce the reports of social worker Albert Linder or psychologist Douglas Darnall, both of whom had previously evaluated Carter. J.A. 38-39. Linder had found that Carter suffered from paranoia and auditory and visual hallucinations, among other symptoms, and "may be suffering from a major psychiatric disorder." *Id.* at 39. Dr. Darnall had found that Carter was suffering from a mental disorder. *Id.* Without the benefit of these opinions, the court concluded Carter was competent to stand trial. T.T. 100.

On the day the trial was scheduled to begin, Dr. Stephen King, a defense expert, notified the court that he had concerns about Carter's competence to stand trial, so the court held a second competency hearing. *Id.* at 469-72. Dr. King testified that Carter reported continued hallucinations, *id.* at 607, laughed inappropriately throughout Dr. King's evaluation, and discussed thoughts of killing trial counsel, *id.* at 559. Dr. King diagnosed Carter with a psychotic disorder that rendered him incapable of assisting in his defense. *Id.* at 567-68. The prosecution's two witnesses confirmed that Carter felt hostility toward his attorneys, *id.* at 704-05, 794, and reported continued hallucinations, *id.* at 668-69, 791, but both prosecution experts opined that Carter was competent to stand trial, *id.* at 636-37, 798-99. The trial court again found Carter competent, and the case proceeded to trial. *Id.* at 860.

During opening statements, Carter spontaneously asked the court if he was required to remain at the trial. *Id.* at 2268. The court insisted that Carter attend the remainder of the day's proceedings while it considered the question. *Id.* at 2280. In reaction, Carter lunged at the judge and had to be restrained and removed by courtroom deputies. *Id.* at 2281-82.

For the remainder of the trial, Carter was placed in a separate room in which he could monitor the proceedings by closed circuit television. *Id.* at 2282. Courtroom deputies were instructed to notify the defense if Carter wanted to communicate with his attorneys. *Id.* at 2286. Defense counsel assured the court that they would confer with Carter "periodically." *Id.* Because of Carter's removal from the trial, neither the judge nor Carter's attorneys

were able to observe Carter continuously and take notice of his mental state.

On the last day of the guilt phase, the defense stated that Carter wanted to return, unshackled, to the courtroom. *Id.* at 3094. Courtroom deputies indicated that if Carter were unshackled they could not protect his attorneys, so the court conditioned Carter's unshackled return on his attorneys' waiver of their own protection. *Id.* at 3094-95. One attorney refused. *Id.* at 3095. The court did not hear directly from Carter regarding the possibility of his return to the trial, and Carter remained absent. J.A. 51.

Carter was convicted of criminal trespass, aggravated robbery, rape, and aggravated murder. T.T. 3243-45.

Based on defense counsel's own concerns about Carter's behavior, counsel purported to waive Carter's presence for the mitigation phase. Counsel stated: "I am still worried about him behaving during this phase, so the bottom line is he wants to stay where he's at." *Id.* at 3251. The court inquired no further.

The mitigation hearing was conducted in a single afternoon. The defense called two witnesses — a social worker and a mitigation specialist. The social worker, who had worked on Carter's case at Children's Services, recounted Carter's placement history and testified to her fear that he was "schizoid-prone." *Id.* at 3253-54, 3258, 3284-91. She acknowledged that her last contact with Carter was in 1986, when he was seven. *Id.* at 3301. Thus, she had no firsthand knowledge of his later childhood

development or his interactions with his adoptive family.

The mitigation specialist, psychologist Sandra McPherson, described Carter's family history of mental illness, family placement history, and childhood emotional problems. *Id.* at 3304-08. Dr. McPherson opined that Sean's "underlying rage . . . is expressed unfortunately in a mixture of both aggression and sexuality insofar as his fantasy life is concerned" and "[t]hat kind of fantasy life is known to produce the[] kinds of crimes" for which Carter was on trial. *Id.* at 3311. According to Dr. McPherson (still on direct examination), Carter "lacks an understanding of pain; he doesn't have the ability to know what other people are thinking, nor does he care; he's always alone." *Id.* at 3318. On cross examination, she agreed that Carter is the type of person who does not "really value life." *Id.* at 3334.

Echoing Dr. McPherson's themes, the defense in closing highlighted Carter's "lack of empathy," *id.* at 3367, and characterized him as a "piece of machinery . . . that doesn't feel for other people," *id.* at 3369. Defense counsel likened Carter to "a big bomb." *Id.* at 3375. Defense counsel concluded by inviting the jury to review the mitigating evidence and "go through it and time line it, whatever, and figure [it] out." *Id.* at 3379.

The jury returned a recommendation of death, which the court imposed. *Id.* at 3408, 3422.

On direct appeal to the Ohio Supreme Court, Carter's claims included incompetence to stand trial and ineffective assistance of counsel; the court

rejected all claims and affirmed the conviction. *State v. Carter*, 734 N.E.2d 345, 355-57, 360 (Ohio 2000).

Carter's state post-conviction petition included his claims of incompetence at trial and ineffective assistance of counsel regarding incompetence and mitigation. 6th Cir. App. 5460-61, 5464-65. Carter sought an evidentiary hearing to establish the facts relevant to his claims. *Id.* at 5465. Without providing Carter a hearing, the state trial court held that the claims were barred by res judicata because they were raised on direct appeal; in the alternative, the trial court concluded that the record was complete and rejected Carter's claims as unsupported by the record. *Id.* at 5532-34, 5537-38. Carter appealed, and the appellate court affirmed. *State v. Carter*, No. 99-T-0133, 2000 Ohio App. LEXIS 5935, at *8-*14 (Ohio Ct. App. Dec. 15, 2000). The Ohio Supreme Court denied review. *State v. Carter*, 746 N.E.2d 612 (Ohio 2001).

Beginning in 2002, Carter was represented by attorneys from the Office of the Ohio Public Defender (OPD). In 2003, OPD attorneys moved to reopen the direct appeal in order to claim ineffective assistance of appellate counsel for insufficient pursuit of the claims regarding ineffective assistance of trial counsel. 6th Cir. App. 5397-5401.[1] The Ohio Supreme Court summarily denied the motion. *Id.* at 5443.

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[1] *See State v. Murnahan*, 584 N.E.2d 1204, 1208-09 (Ohio 1992) ("[C]laims of ineffective assistance of appellate counsel are not cognizable in [Ohio] post-conviction proceedings. . . . [The defendant] may pursue delayed reconsideration [of his appeal]."), *codified into rule as modified*, Ohio R. App. Pro. 26(B).

B. Proceedings below

When OPD attorneys sought to pursue federal habeas relief on Carter's behalf, Carter refused to meet with them. J.A. 18. Based on this refusal, his placement in Ohio's psychiatric incarceration facility, and his state case worker's statement that Carter was mentally ill, the OPD filed a suggestion of incompetence with the District Court for the Northern District of Ohio. *Id.* at 18-19. Counsel also filed a habeas petition on Carter's behalf, asserting, among other claims, incompetence to stand trial, ineffective assistance of trial and appellate counsel regarding the competence issue, and ineffective assistance of trial counsel in mitigation. *Id.* at 37-54, 54-70, 75-76, 77-79 (amended petition).

In response to the state's contention that counsel did not represent Carter's interests, counsel obtained an affidavit from Carter stating that he wanted them to pursue habeas relief on his behalf. *Id.* at 24. But Carter subsequently refused to meet with his counsel, instead lying on the floor outside the visiting room during counsel's attempted visit. *Id.* at 103. On other occasions, Carter was willing to meet with counsel but did not seem to remember who counsel was and said he did not care what happened in his case. *Id.* at 103-04.

The court granted a competency hearing, at which both sides presented the opinions of mental health experts. Pet. App. 28a-36a. Through a report and testimony, one of Carter's experts, psychologist Bob Stinson, diagnosed Carter as suffering from schizophrenia, as well as other psychological disorders. *Id.* at 30a. He testified that Carter experienced hallucinations, distorted thinking,

unpredictable agitation, and spontaneous laughter. *Id.* Carter could not effectively communicate; he provided only vague answers to questions because he lacked the ability to elaborate. *Id.* at 31a. Carter did not understand the nature of the habeas proceedings, held the false belief that he could not be executed unless he volunteered, and misidentified the State's expert witness against him as one of his own attorneys. *Id.* A neuropsychologist, Dr. Michael Gelbort, testified to Carter's fragmented and distracted thinking and explained that Carter would have trouble responding to questions and recalling events. *Id.* at 33a.

The State's expert, Dr. Phillip Resnick, concurred in Dr. Stinson's diagnosis of schizophrenia. *Id.* at 34a. But, relying on second-hand reports of Carter's conversations with a social worker, Dr. Resnick disputed that Carter held false beliefs regarding his risk of execution. *Id.* Dr. Resnick acknowledged that Carter lacked the ability to describe details of events, but Dr. Resnick nonetheless opined Carter could sufficiently communicate with his counsel. *Id.* at 35a.

After the hearing, Dr. Stinson submitted a supplemental report on Carter's condition, which had deteriorated further. He noted that the State itself temporarily transferred Carter back to its psychiatric incarceration facility. *Id.* He observed that Carter continued to experience hallucinations and now was "unable to comprehend or respond to communications from others." *Id.* Carter engaged in nightly screaming and laughing. *Id.* at 36a. Habeas counsel added that Carter could not remember his trial, the penalty-phase verdict, his trial attorneys, or even the experts who had recently examined him. J.A. 106-07.

The district court found Carter incompetent. Pet. App. 44a. The court credited Dr. Stinson's conclusion that Carter could not comprehend the nature of the habeas proceedings, and the court found that testimony from both sides showed that Carter could not assist his counsel because his mental illness prevented him from accurately recounting events or identifying significant or even relevant information he should convey. *Id.* at 45a-47a.

Relying on *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003), the district court concluded that adjudicating Carter's habeas petition was inappropriate in light of his incompetence. Pet. App. 36a-42a, 47a. The court found that Carter's competent assistance — in the form of his recollections — was needed for his claims of incompetence to stand trial, ineffective assistance of trial and appellate counsel regarding competence, and ineffective assistance of trial counsel during the mitigation phase. *Id.* at 42a-43a, 47a.

The district court decided that the appropriate remedy was to dismiss Carter's habeas petition without prejudice and prospectively toll the statute of limitations, allowing Carter to re-file his petition after he was restored to competence. *Id.* at 52a-53a.

The Court of Appeals for the Sixth Circuit amended the district court's order and remanded the case for reconsideration. Citing *Rees v. Peyton*, 384 U.S. 312 (1966), in which this Court required an inquiry into the competence of a habeas petitioner who wished to abandon his petition, the court of appeals held that the district court had not abused its discretion in holding a competency hearing because Carter's refusals to meet with his attorneys

would have effectively terminated his opportunity for habeas review. Pet. App. 7a-8a. The court further concluded that the district court, based on the evidence before it, had not abused its discretion in finding Carter incompetent to assist counsel. *Id.* at 8a-9a.

However, the court of appeals rejected the district court's remedy as overly broad. The court noted that the terms of the district court's dismissal unfairly shifted to the warden the onus of attempting to proceed by repeatedly filing petitions seeking to enforce Carter's sentence. *Id.* at 10a. The proper course, the appellate court held, was for the district court to employ its inherent discretionary authority to stay the proceedings so that the court could "monitor Carter's on-going condition." *Id.* at 14a. The court of appeals explained that the district court should stay only those claims that require Carter's assistance, such as claims whose "factual basis . . . is locked away exclusively in his memory." *Id.* at 12a. Claims for which Carter's assistance was "not essential" — for instance, because "evidence could be replicated by, or substituted with, other sources" — could be litigated by a next friend. *Id.* at 13a. The court of appeals therefore held that Carter's petition should be stayed "with respect to his ineffective assistance claims and any other claims that the district court determines essentially require his assistance," and the court remanded for imposition of a stay and determination of which of the remaining claims "essentially require [Carter's] assistance." *Id.* at 15a.

Without challenging the conclusion that Carter was incompetent and unable to assist his counsel,

the dissent contended that all of Carter's claims should be pursued by a next friend. *Id.* at 16a. The dissent acknowledged that at least two of Carter's claims could benefit from his assistance, *id.* at 24a, but argued that "[t]he incompetency of witnesses does not stop civil proceedings," *id.* at 25a.

SUMMARY OF ARGUMENT

Habeas courts have inherent discretionary power to enter stays. And our common-law tradition has long recognized the importance of a criminal defendant's competence to the fair adjudication of his case, from arraignment to execution. In *Rees v. Peyton*, 384 U.S. 312 (1966), this Court synthesized these principles and stayed a capital habeas case because of the petitioner's incompetence. This case asks the Court to confirm a court's equitable power to issue a stay where it finds that a habeas petitioner is incompetent and has potentially meritorious, fact-based claims for which his assistance is necessary.

The warden argues vigorously against a statutory right to a competency stay. This Court need not consider that argument, because a simpler, narrower ground of decision is available: the equitable discretion of habeas courts.

At common law, the competence of a criminal defendant was a *sine qua non* of adjudication at all stages of the case. The bar on proceeding against a charged or convicted incompetent individual — a bar set down by Blackstone and other leading common-law theorists, and recognized in early American practice and by this Court — proceeds from a basic moral proposition: no individual should lose his chance to allege a viable defense to his charge or

sentence simply because he has had the misfortune to be stricken with a debilitating mental illness.

The warden asks this Court to abjure this time-honored principle in service of interests of much more recent vintage — the finality and efficiency goals underlying AEDPA. But AEDPA's purposes do not require the categorical elimination of district courts' equitable discretion to apply traditional precepts carried down from the common law. As this Court has repeatedly admonished, AEDPA's purposes are not to be pursued at all costs, and in some cases a petitioner's interest in obtaining review of potentially meritorious claims must take priority. For this reason, this Court should not adopt the warden's proposed blanket ban on incompetency stays. A case-by-case approach of guided discretion is more appropriate.

The facts of this case highlight factors that can channel district courts' discretion in the competency context. First, to warrant a stay, a petitioner should be shown based on expert opinion to be genuinely incompetent. Trial courts are fully qualified to determine competence and have done so for centuries. Second, the petitioner should be raising claims for which his competent assistance is necessary, such as claims for which the petitioner's recollection is needed to establish key facts not available in the record. Assessing this second factor inevitably involves a degree of uncertainty — if the court knew precisely what the petitioner could contribute if he were competent, the petitioner's assistance would be unnecessary — but the common law tolerated this uncertainty and erred on the side of the prisoner, in service of what Blackstone called

"the humanity of the English law." 4 William Blackstone, *Commentaries on the Laws of England* 24 (1769). Third, the petitioner's claims should be viable under federal habeas law. In this regard, this Court's recent decision in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), is relevant but not dispositive. *Pinholster* does not preclude the consideration of new facts in all federal habeas cases; in certain circumstances, the federal court may consider them, while in others the court may grant the petitioner the opportunity to return to state court to exhaust claims involving newly developed facts. Because it constricts the universe of cases in which new facts can be considered, *Pinholster* may cabin the exercise of district courts' discretion to issue incompetency stays, but it does not snuff out such discretion entirely.

The warden argues that an indefinite stay is categorically impermissible. This argument misreads *Rhines v. Weber*, 544 U.S. 269 (2005), which held only that an indefinite stay is impermissible when a petitioner requests a stay-and-abeyance so that he can return to state court and exhaust all his claims. In fact, *Rhines* supports the type of guided equitable discretion that the lower courts have exercised — and, under the Sixth Circuit's narrow remand order, will continue to exercise — in this case. Moreover, the warden's broadside against indefinite stays ignores *Rees*, in which this Court stayed a habeas case indefinitely because of the petitioner's incompetence.

The warden's fears that incompetency stays will become widespread are unjustified. In the forty-five

years since *Rees*, the number of stays granted has been negligible.

Incompetency stays are appropriately reserved for unusual circumstances. But in such circumstances — including this case, in which the petitioner has suffered from mental illness since before his trial and raises fact-based claims for which his competent assistance is necessary — such stays must be available, so that district courts can exercise their discretion, consistent with our common-law tradition, to protect against the forfeiture of claims because of mental illness.

ARGUMENT

I. Courts Have Discretion To Stay Habeas Proceedings Because Of The Petitioner's Mental Incompetence.

This Court need not consider the statutory argument with which the warden's brief begins — i.e., that there is no "statutory right" under 18 U.S.C. § 4241 to be competent in habeas proceedings. Although the court of appeals used that phrase (perhaps inaptly) to describe *Rees v. Peyton*, 384 U.S. 312 (1966), in which this Court cited the predecessor provision of § 4241 in ordering a competency hearing for a habeas petitioner who tried to abandon his petition, the holding below is narrower that the warden suggests. Following this Court's example in *Rees*, 384 U.S. at 314, the Sixth Circuit used § 4241 as a guide to the competency inquiry that might, but need not always, occur: district courts, the Sixth Circuit explained, "*may* employ section 4241." Pet. App. 7a (emphasis added). The basis on which the court of appeals endorsed the district court's decision

to suspend Carter's case was the district court's inherent authority "to stay proceedings and manage its docket as it sees fit." Pet. App. 14a.

The dispositive question in this case is the second question the warden addresses: whether a district court has discretion to stay habeas proceedings based on the habeas petitioner's incompetence. In accordance with this Court's habeas jurisprudence, our common-law tradition, and the inherent powers of the federal courts, the answer is yes.

A. District courts possess inherent authority to stay cases, including habeas cases.

The power of a district court to manage the cases before it includes the power to stay proceedings. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Enelow v. N.Y. Life Ins. Co.*, 293 U.S. 379, 381-82 (1935), *overruled on other grounds*, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287 (1988). This power applies no less in habeas cases than in other types of cases. *See Rhines v. Weber*, 544 U.S. 269, 276 (2005).

Although AEDPA "circumscribe[s]" courts' discretion to stay habeas cases, insofar as stays must be compatible with AEDPA's purposes of reducing delays in habeas review and promoting finality, "AEDPA does not deprive district courts of [their traditional stay] authority[.]" *Id.* In passing AEDPA, Congress "did not seek to end every possible delay at all costs." *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010). On the contrary, "Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental

fairness in the imposition of the death penalty." *McFarland v. Scott*, 512 U.S. 849, 859 (1994).

Accordingly, the Court has recognized that, in some circumstances, "the petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions." *Rhines*, 544 U.S. at 278. Interpreting AEDPA requires consideration not only of the statute's purposes, but also of the practical effects of any proposed interpretation, particularly where petitioners are at risk of forever losing their opportunity for federal review of particular claims. *Panetti v. Quarterman*, 551 U.S. 930, 945-46 (2007); *see also Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012) (holding that if state collateral review provides the only opportunity to raise a particular claim, an attorney's erroneous failure to raise that claim in that setting excuses procedural default, because otherwise "no court will review the prisoner's claims").

Applying these principles, the Court has held that, notwithstanding AEDPA, courts may apply the equitable principles that have traditionally governed habeas corpus, such as equitable tolling. *Holland*, 130 S. Ct. at 2562. The Court has carefully and pragmatically interpreted AEDPA's bar on "second or successive" petitions so as not to foreclose mentally incompetent individuals' efforts to invoke the Eighth Amendment's ban on executing the insane — a claim that usually becomes ripe only after the first habeas petition has been filed. *Panetti*, 551 U.S. at 947. And this Court has unanimously held that courts may stay mixed petitions (i.e., habeas petitions that include both exhausted and unexhausted claims) and

hold them in abeyance pending resolution of unexhausted claims in state court. *Rhines*, 544 U.S. at 278.

Like petitioners with potentially meritorious claims unexhausted through no fault of their own, and petitioners entitled to equitable tolling, a mentally incompetent petitioner has a substantial and legitimate interest in retaining the ability to pursue his claims. As explained below, a petitioner's interest in not losing the opportunity for a full hearing of his claims on account of mental illness has long been recognized in the common law and the jurisprudence of this Court.

B. Our tradition recognizes the importance of mental competence at all stages of criminal proceedings.

Because habeas corpus is a remedy with "its root deep [in] the genius of our common law," *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (citations and internal quotation marks omitted), "this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country" to inform its application of the Great Writ. *Jones v. Cunningham*, 371 U.S. 236, 238 (1963).[2]

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[2] The warden does not deny this point; rather, he argues that the common law should not inform the interpretation of the right-to-counsel statute, 18 U.S.C. § 3599. But the Court need not construe that statute to determine the scope of a habeas court's inherent authority to manage the cases before it. *See, e.g.*, *Holland*, 130 S. Ct. at 2560 ("[E]quitable principles have traditionally governed the substantive law of habeas corpus[.]" (citation and internal quotation marks omitted)).

At common law, the mental competence of an accused or convicted individual was a *sine qua non* not only at trial but also at subsequent stages of the proceedings through and including execution. Although habeas review of criminal convictions did not then exist in its present form, *see Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-03 (1830), one of the chief reasons for the common law's concern for competence was to enable the accused to retain the opportunity to assert defenses, even after conviction. As Blackstone explained:

> [T]hough a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution: for . . . *the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings.*

4 William Blackstone, *Commentaries on the Laws of England* 388-89 (1769) (emphasis added); *see also id.* at 24-25 ("[I]f after judgment he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.").

Other leading common-law authorities agreed that criminal proceedings, *at whatever stage*, from arraignment to execution, ought to be stayed if the accused is incompetent, and they agreed with Blackstone that a primary rationale was the

possibility that the accused or convicted individual might, if sane, be able to assert a defense. *See* John Hawles, *Remarks on Mr. Bateman's Tryal*, *in Remarks upon the Tryals* (1689), *reprinted in* 11 How. St. Tr. 473, 476 (1811) ("[N]othing is more certain law, than that a person who falls mad after a crime supposed to be committed, shall not be tried for it; and if he falls mad after judgment he shall not be executed . . . . [T]he true reason of the law I think to be this, a person of 'non sana memoria,' and a lunatick during his lunacy, is by an act of God . . . disabled to make his just defence. There may be circumstances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defence[.]"); 1 Matthew Hale, *The History of the Pleas of the Crown* 35 (Lawbook Exchange 2003) (1736) ("[I]f [a] person after his plea, and before his trial, become of *non sane memory*, he shall not be tried; or, if after his trial he become of *non sane memory*, he shall not receive judgment; or, if after judgment he become of *non sane memory*, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution."); *see also Frith's Case*, 22 How. St. Tr. 307, 311 (1790) ("[S]uch is the humanity of the law of England, that in all stages both when the act is committed, at the time when the prisoner makes his defence, and even at the day of execution, it is important to settle what his state of mind is[.]").

Nineteenth-century British commentators (some published in the United States as well as Britain) agreed, all restating, sometimes verbatim, the Blackstone rule. *See* 1 William Oldnall Russell, *A*

Treatise on Crimes and Indictable Misdemeanors 12 (1831); Leonard Shelford, *A Practical Treatise of the Law Concerning Lunatics, Idiots, and Persons of Unsound Mind* 595 (2d ed. 1847); 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 760-61 (5th Am. ed. 1847). Nineteenth-century American practice adhered to the Blackstone position. *See, e.g., Youtsey v. United States*, 97 F. 937, 940-41 (6th Cir. 1899); *State v. Vann*, 84 N.C. 722 (1881); *see also In re Buchanan*, 61 P. 1120, 1121 (Cal. 1900) (discussing a state statute implementing the common law); *Freeman v. People*, 4 Denio 9, 19-20 (Sup. Ct. N.Y. County 1847) (same); *see generally* 2 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 664 (2d ed. 1872) ("[A] prisoner cannot be tried, sentenced, or punished, while he is known to be insane."). The Supreme Court of Michigan explained specifically that "insanity, when discovered, was held at common law to bar any further steps against a prisoner, *at whatever stage of the proceedings*." *Underwood v. People*, 32 Mich. 1, 1 (1875) (emphasis added).

Concern for the loss of the mentally incompetent individual's opportunity to defend himself from a charge or a judgment extended to any available grounds: both eighteenth- and nineteenth- century authorities referred to the possibility that the incompetent person could provide "some reason" to stay the proceedings, 4 Blackstone, *Commentaries* 389; "allege somewhat in stay of judgment or execution," 1 Hale, *Pleas of the Crown* 35; or "assign[] any error in the judgment," 1 Chitty, *Practical Treatise* 761.

Over a century ago, this Court cited Blackstone's position along with Hale's as indicative of the common-law rule on incompetence. *See Nobles v. Georgia*, 168 U.S. 398, 406-07 (1897). And Justice Frankfurter, in a prescient dissent from the Court's rejection of a due process claim by an allegedly insane individual set to be executed, *see Solesbee v. Balkcom*, 339 U.S. 9 (1950), *abrogated by Ford v. Wainwright*, 477 U.S. 399 (1986), referred to the principle that "one under sentence of death ought not, by becoming non compos, be denied the means to 'allege somewhat' that might free him" as "the unbroken command of English law for centuries preceding the separation of the Colonies." 339 U.S. at 19-20 (Frankfurter, J., dissenting) (quoting 1 Hale, *Pleas of the Crown* 35).

In the contexts of competence to stand trial and competence to be executed, this Court's jurisprudence has incorporated and perpetuated the common-law view on competence. In explaining why an incompetent person cannot be subjected to a criminal trial, this Court has repeatedly voiced Blackstone's principal concern: "[I]f he became 'mad' after pleading, he should not be tried, 'for how can he make his defense?'" *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (quoting 4 Blackstone, *Commentaries* 24); *accord*, *Cooper v. Oklahoma*, 517 U.S. 348, 356 (1996); *Medina v. California*, 505 U.S. 437, 446 (1992). The Court likewise cited Blackstone, along with Hale, Hawles, and others, in support of its holding in *Ford v. Wainwright*, 477 U.S. 399 (1986), that the Eighth Amendment bars the execution of the mentally incompetent. *See id. at* 406-09.

Although Justice Powell joined the portion of the Court's opinion in *Ford* setting forth its Eighth Amendment holding and its common-law underpinnings, his concurrence questioned the contemporary relevance of Blackstone's and Hale's concern that a defendant retain the ability to make arguments on his own behalf. *See id.* at 420-21 (Powell, J., concurring in part and concurring in the judgment). Justice Powell expressed faith that, in light of more comprehensive modern review procedures, including federal habeas corpus, it is "unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free." *Id.* at 420.

But the common-law concern that an incompetent individual "might have offered some reason, if in his senses, to have stayed these respective proceedings," 4 Blackstone, *Commentaries* 389, retains its vitality where a petitioner's incompetence disables him from communicating grounds for relief and thereby jeopardizes the effectiveness of federal habeas corpus itself, one of the review procedures upon which Justice Powell relied. *See Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 811 (9th Cir. 2003) (Kozinski, J.). "It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment); *see also Holland*, 130 S. Ct. at 2562 ("[T]he 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000))). Therefore, the common law's traditional reasons for insisting on competence at every stage of the proceedings are acutely relevant to the exercise

of a court's discretion in the case of an incompetent habeas petitioner.

C. The incompetence of a habeas petitioner is a valid reason to stay habeas proceedings.

Over a century ago, this Court in dicta synthesized the common-law concern for competence with courts' longstanding discretion to manage post-conviction proceedings: "[B]y the common law, if, after conviction and sentence, a suggestion of insanity was made . . . [the judge] should take such action as, in his discretion, he deemed best." *Nobles v. Georgia*, 168 U.S. 398, 407 (1897) (rejecting right to jury trial to determine insanity post-conviction).

This Court's disposition of *Rees v. Peyton*, 384 U.S. 312 (1966), *held without action*, 386 U.S. 989 (1967) ("*Rees II*"), *writ dismissed sub nom. Rees v. Superintendent of Va. State Penitentiary*, 516 U.S. 802 (1995) ("*Rees III*"), put the *Nobles* dictum into practice and confirmed that federal courts' normal equitable discretion to stay habeas cases applies to circumstances in which a habeas petitioner has become mentally incompetent. In *Rees*, a habeas petitioner sought to abandon his habeas rights by withdrawing a petition for certiorari seeking review of the denial of habeas relief by lower courts. 384 U.S. at 313. The petitioner's attorney alerted the Court to his doubts about the petitioner's competence, and the Court directed the district court to hold an evidentiary hearing on that question. *Id.* at 313-14. When the district court found the petitioner incompetent, this Court ordered that the petition be stayed, over the strong objection of the Commonwealth of Virginia. *Rees II*, 386 U.S. 989

(holding case in abeyance); *see* Resp. Br. 2-3, *Rees v. Peyton*, Misc. No. 9 (U.S. Mar. 14, 1967) [hereinafter "*Rees II* Resp. Br."] (available in the Library of the Court) (noting district court's finding of incompetence and Virginia's opposition to further stay); *accord*, Phyllis L. Crocker, *Not To Decide Is To Decide: The U.S. Supreme Court's Thirty-Year Struggle With One Case About Competency To Waive Death Penalty Appeals*, 49 Wayne L. Rev. 885, 915 (2004). The stay remained in effect, undisturbed, for nearly thirty years, and the Court dismissed the case after the petitioner died. *Rees III*, 516 U.S. 802; *see* Crocker, *Not To Decide*, 49 Wayne L. Rev. at 935.

Although *Rees* was an unusual case, it demonstrates that the federal courts have the inherent power to stay a habeas petition because of the petitioner's incompetence. *See Rohan*, 334 F.3d at 815 ("We obviously presume that the Supreme Court follows the law even when acting through summary orders rather than reasoned opinions. The record in *Rees II* shows that incompetence is grounds for staying habeas proceedings."). Following *Rees*, all three courts of appeals to consider the question (the Sixth, Seventh, and Ninth Circuits) have held that habeas proceedings may be stayed where the petitioner is incompetent to assist counsel. *See* Pet. App. 15a; *Holmes v. Levenhagen*, 600 F.3d 756, 763 (7th Cir. 2010) (Posner, J.); *Rohan*, 334 F.3d at 815. No court of appeals has held otherwise.

Indeed, the United States agrees (and even the warden finds it conceivable) that "district courts have inherent authority to grant[] limited competency-related stays in appropriate circumstances." U.S. Br.

14.; *see also* Pet. Br. 31 (conceding that AEDPA would not necessarily foreclose a stay).

The warden seeks to minimize the significance of *Rees* by characterizing it as the product of a "judicially negotiated settlement"; the warden claims that "[o]nce the district court found the prisoner incompetent, counsel for Virginia acceded to the indefinite stay." Pet. Br. 21. This assertion is incorrect: Virginia's brief to this Court following the determination of incompetency stated that the Commonwealth "strenuously opposes any stay." *Rees II* Resp. Br. 3; *see also id.* ("[U]nder no circumstances should this matter be further stayed.").

The warden interprets equivocal statements in a memorandum from the Clerk of the Court as evidence that Virginia actually agreed to a stay in the course of a post-briefing conversation with the Clerk. *See* Pet. Br. 21. But the memorandum noted that, during the conversation, Virginia's attorney raised several objections to a stay. *See* Pet. Br. App. 1. Therefore, the Clerk's qualified conclusions that "he really has no *substantial* objection" and that counsel "do not *really* present any objection," *id.* at 1, 2 (emphasis added), appear to reflect an evaluation of the objections that Virginia's attorney did offer, rather than a sudden change in position by the Commonwealth. Even if the memorandum were read as the warden proposes, a party's grudging acceptance of a result presented as this Court's "proposed disposition of [a] case," *id.* at 1, is hardly the same as freely agreeing to "settle" the case on those terms — particularly where the party had, less than three weeks earlier, "strenuously oppose[d]" that very result. *Rees II* Resp. Br. 3.

The warden also suggests that *Rees* is irrelevant here because the reason for the stay in this case is Carter's incompetence *to assist* in his proceedings rather than his competence *to terminate* his proceedings. Pet. Br. 20. But the warden and the United States both acknowledge that district courts have authority to issue stays in certain cases because of a petitioner's incompetence *to proceed* (not merely because of a petitioner's incompetence *to decide* whether to proceed). *See id.* at 31; U.S. Br. 29-31. Given the case-specific nature of courts' discretion to stay habeas cases, the fact that *Rees* did not address the precise circumstances presented here is irrelevant. Indeed, if the Court's only concern in *Rees* had been the petitioner's competence to withdraw his petition, it would have proceeded to adjudicate the petition once it found him incompetent to withdraw it; instead, the Court granted a stay that halted the entire proceeding. What *Rees* demonstrates is that, based on the traditional equitable stay authority of habeas courts and our legal tradition's longstanding concern for competence in criminal and related proceedings, a petitioner's incompetence during his habeas proceedings can be a valid reason for a stay.

D. This case provides a model for the careful exercise of stay authority within the limits of AEDPA and *Pinholster*.

That courts have the power to stay habeas proceedings because of the petitioner's incompetence does not mean (as the warden implies) that such power is limitless or immune from review. The federal courts' equitable powers and inherent authority to control proceedings before them are not unconstrained: "[C]ourts of equity must be governed

by rules and precedents no less than the courts of law." *Holland*, 130 S. Ct. at 2563 (citation and internal quotation marks omitted).

The narrow decision below, in which the Sixth Circuit indicated that a stay would be appropriate but remanded to the district court to determine the contours of such a stay based on the specific claims presented, reflects due consideration of three factors that should guide courts' discretion in striking a proper balance between AEDPA's goals and fairness to an incompetent habeas petitioner.

1. District courts should rely on expert opinion to determine whether the petitioner is genuinely incompetent, as Carter is.

To ensure that a habeas petitioner seeking a stay because of incompetence is not engaging in "dilatory litigation tactics," *Rhines*, 544 U.S. at 278, a court concerned about a petitioner's competence should carefully evaluate his mental state with the help of expert witnesses or reports, as this Court ordered in *Rees* and as the district court did here. Adjudicating competence is a task common-law courts have performed for centuries. *See Cooper v. Oklahoma*, 517 U.S. 348, 356-57 (1996) (discussing the historical practice of trials to determine competence).

The warden seems to distrust district courts' ability to make sound findings regarding mental health. *See, e.g.*, Pet. Br. 29. The warden implies that mental health problems are easy to fake, and that unless the decision below is reversed, conniving habeas petitioners will run roughshod over gullible district courts. Such concern is unfounded. District

courts regularly rule on complex issues involving expert testimony, including (in federal criminal proceedings) the issue of a defendant's competence to stand trial. The warden has offered no reason to believe that a district court lacks the ability to assess a petitioner's current mental state and draw conclusions grounded in both fact and science. On the contrary, this Court has "presume[d] . . . that it is unusual for even the most artful malingerer to feign incompetence successfully for a period of time while under professional care." *Cooper*, 517 U.S. at 365. Common-law authorities, likewise, were unmoved by the possibility of deception. In the words of Sir John Hawles, later Solicitor General to King William III:

> I know it will be objected, that if this matter of *non sana memoria* should be permitted to put off a trial or stay execution, all malefactors will pretend to be so: But I say there is a great difference between pretences and realities, and *sana* and *non sana memoria* hath been often tryed in capital matters, and the prisoners have reaped so little benefit by their pretences, it being always discovered, that we rarely hear of it.

John Hawles, *Remarks on Mr. Bateman's Tryal*, *reprinted in* 11 How. St. Tr. at 477-78 (citation omitted).

Here, the district court's finding of genuine incompetence was well-justified by the record. The State itself has repeatedly assigned Carter to its psychiatric prison facility. *See* J.A. 32; Pet. App. 35a. Having examined Carter, experts for both sides agreed that he is schizophrenic. Pet. App. 30a, 34a. One of Carter's experts, Dr. Stinson, elaborated that

Carter's condition entails hallucinations and problems in perception, including the persistent false belief that he cannot be executed unless he volunteers, and his misidentification of the State's expert as Carter's own attorney. *Id.* at 30a-31a.

Carter's mental illness has a profound effect on both his understanding of the proceedings and his ability to identify, recall, and communicate relevant facts. Both sides' experts agreed that Carter could not provide specific information regarding his trial or mitigating circumstances that his trial counsel could have presented but did not. *Id.* at 45a-47a. Moreover, after the competency hearing, Carter's condition declined to the point where he could not remember the penalty verdict at his trial, J.A. 107, and could no longer "comprehend or respond to communications from others," Pet. App. 35a. The district court's finding of incompetence was thus strongly supported in the record.

2. District courts should consider whether the petitioner's assistance is necessary, as it is in Carter's case.

For a habeas petitioner whose assistance is necessary for his claims — for example, a petitioner who raises claims that depend on factual matters within his own knowledge but not contained within the record — a stay may be required to protect the petitioner from losing his claims through no fault of his own. By contrast, a petitioner with a purely record-based claim — such as a claim of improper prosecutorial argument — is less likely to require a stay so that he may regain his competence.

Obviously, the determination of whether a habeas petitioner's assistance is necessary cannot depend on proving the *particular* facts the petitioner would be expected to provide if he were competent. As Judge Kozinski has pointed out, "[r]equiring an incompetent petitioner's counsel to identify precisely what the petitioner would tell him were he able seems more likely to elicit the response, 'Well, if I knew that, I wouldn't have to ask!'" *Rohan*, 334 F.3d at 818. The common law likewise reflected the practical reality that, when a court is dealing with an individual who is not mentally competent, some degree of uncertainty is inevitable. *See, e.g.*, 4 Blackstone, *Commentaries* 24-25 ("[H]ad the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."); 1 Hale, *Pleas of the Crown* 35 ("[W]ere he of sound memory, he might allege somewhat in stay of judgment or execution."). The analysis should therefore focus on the type of claims at issue and whether the proffer of petitioner's counsel regarding additional facts is plausible. *Cf. Rhines*, 544 U.S. at 278 (stay appropriate where claims are "potentially meritorious").

It is also appropriate to consider, as the Sixth Circuit ordered the district court to do here, whether the purpose of an incompetency stay could be served by the appointment of a next friend. *See* Pet. App. 13a; *Whitmore v. Arkansas*, 495 U.S. 149, 162-64 (1990). But there are limits to what a next friend can do. If what is required from the petitioner is a crucial set of facts only the petitioner himself could know, a next friend cannot substitute. *See* Pet. App. 12a-13a ("Where the factual basis for Carter's claims is locked away exclusively in his memory, he faces the lonely

certainty that no friends in this world could *meaningfully* be dedicated to his interests because they lack the benefit of his knowledge." (emphasis in original)); *Rohan*, 334 F.3d at 816 ("No matter how faithfully [the next friend] may act in [the petitioner's] best interests, she cannot get inside his head any more than his counsel can.").

Here, the district court correctly recognized that certain of Carter's fact-based claims are plausible and require his competent assistance: specifically, claims arising from his incompetence to stand trial (and ineffective assistance claims premised thereon) and the claim that trial counsel was ineffective during mitigation. Pet. App. 42a-43a.

The most relevant facts regarding whether Carter was incompetent to stand trial are Carter's own experiences, thoughts, and capacities of perception and expression at the time of his trial in 1998 — especially during the trial itself, when Carter's petition claims that his lawyers should have renewed the competence issue in response to Carter's bizarre behavior and unwillingness to remain in the courtroom. *See Drope v. Missouri*, 420 U.S. 162, 182 (1975) ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."); J.A. 45-50. Facts about Carter's mental state at that time cannot be gleaned from other sources because of Carter's absence from his own trial. Normally an attorney can observe his client and be alert to his deteriorating capacity. Normally the judge can also observe the defendant's condition to determine whether further

inquiry into competence is necessary. *See Godinez v. Moran*, 509 U.S. 389, 408 (1993) (Kennedy, J., concurring in part and concurring in the judgment). But here, apart from trial counsel's once-a-day visits to Carter's remote location, neither Carter's attorneys nor the judge could observe signs of his mental condition continuously throughout the trial. J.A. 46-48.

Only Carter could know what he observed during that time and his reactions to the trial — or even whether he was capable of reacting or communicating his reactions. Pet. App. 47a (explaining that Carter cannot assist his attorneys in his habeas proceeding because in his current condition, he "could not reasonably be expected to recall and describe how well he was able to view the trial once he was removed from it"). Only Carter could know what he tried to communicate to counsel and whether he was successful. Only Carter could describe his perceptions at the time of trial to shed light on whether he was then impaired by the schizophrenic symptoms — including hallucinations and loss of touch with reality — that plague him today. *See Drope*, 420 U.S. at 181 ("[A]s a result of petitioner's absence the trial judge and defense counsel were no longer able to observe him in the context of the trial and to gauge from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him."); *see also Rohan*, 334 F.3d at 818 ("If [petitioner] were competent today, he could provide information to bolster [his claim of incompetence to stand trial]. His own testimony about his former state of incompetence, for example,

would (to the extent credited by the court) support his position.").

In arguing that the stay of Carter's case was inappropriate, the United States relies on the critical assumption that "[c]ounsel will *usually* have means other than the prisoner's knowledge to establish facts outside the record that bear on a potentially meritorious claim." U.S. Br. 30 (emphasis added). But this case is not "usual." Here, given Carter's precarious mental state and his isolation during his trial, the assumption that facts can be obtained from other sources does not hold.

As to the claim of ineffective assistance of counsel at mitigation, Carter's case exemplifies this Court's observation that "a claim of ineffective assistance . . . often turns on evidence outside the trial record." *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012). Here, the case in mitigation consisted of just two witnesses, one of whom had no personal knowledge of Carter's life past age seven, and the other of whom was a mitigation specialist who had met Carter only for the purposes of his trial. *See* J.A. 56. Only Carter could know who else might have been called to fill in the details of his pre-adolescent and adolescent years, including the difficulties he experienced living with his adoptive family. *See id.* at 60-61.

Notably absent from the short roster of mitigation witnesses was Carter's foster mother Ida Magee, who alone of all of his guardians during a childhood marred by abuse, neglect, and a revolving door of placements, provided a supportive environment for him and thought highly of him. *Id.* at 62-63. Carter's assistance is needed to identify other witnesses who might have helped humanize him for the jury, and to

explain what other leads he gave or could have given trial counsel about mitigation if asked. *See* Pet. App. 47a (finding that Carter "does not have the present capability to judge and express to habeas counsel what mitigating evidence from his social and family background defense counsel should have introduced during the sentencing phase of trial").

The American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("*Guidelines*"), to which this Court has approvingly referred in considering counsel's responsibilities in capital cases, *see Rompilla v. Beard*, 545 U.S. 374, 387 & n.7 (2005), require counsel to "conduct an ongoing, exhaustive and independent investigation of every aspect of the client's character, history, record and any circumstances of the offense" including "in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses who are familiar with the client's life, history, or family history," and a survey of the client's

> medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and

> community influences; [and] socio-economic, historical, and political factors.

Guidelines 10.11(B)-(C) (Supp. 2008), *reprinted in* 36 Hofstra L. Rev. 677, 689 (2008). Counsel's duties in this regard have been clear for decades. *See Guidelines* 10.7 & 10.11 (2003), *reprinted in* 31 Hofstra L. Rev. 913, 1015-27, 1055-70 (2003); *Guidelines* 11.4.1(D)(2)-(3), 11.8.3(F), 11.8.6(B) (1989).[3] It is difficult to imagine how a court could gauge whether Carter's counsel met these standards without an understanding of what evidence was missing at trial — an understanding for which Carter's assistance is needed. In some cases, a petitioner's competent assistance may not be essential for ineffective assistance claims, because the missing information can be gleaned from the other witnesses who did testify at mitigation. But in this case, neither of the two witnesses presented had personal knowledge of Carter's life after age seven.

Relatedly, Carter's attorneys purported to waive his presence for the entire penalty phase, a separate ground for Carter's ineffective assistance claim. J.A. 50-52. The degree to which Carter's attorneys seem to have projected their own preferences onto Carter himself is refleted in counsel's statement to the trial court regarding Carter's presence at the penalty phase: "*I* am still worried about him behaving during this phase, so the bottom line is *he wants* to stay where he's at." T.T. 3251 (emphasis added). Other

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[3] The 1989 Guidelines are available at: http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/1989Guidelines.authcheckdam.pdf.

than his lawyers, only Carter could know whether his lawyers' representations were accurate and whether he wanted to waive his presence for the penalty phase — a decision that can be highly damaging. *See Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring in the judgment) ("It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial . . . . At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial.").

The United States' suggestion that information about Carter's communications with his trial counsel could be gleaned from the lawyers themselves, U.S. Br. 32, rings hollow, because the lawyers would have an interest, adverse to Carter's, in defending their own competence. *See Massaro v. United States*, 538 U.S. 500, 506 (2003) ("[T]rial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel's own incompetence."). Even indulging the notion that Carter's trial attorneys would confess an inadequate investigation, Carter's recollections would be necessary to establish that he was prejudiced because a more effective investigation would have uncovered potentially useful facts in mitigation. And of course the attorneys' testimony cannot reach into the biggest black box in this case — Carter's mental state during the trial, when he was utterly alone.

3. District courts should consider relevant procedural doctrines, including *Pinholster*, which does not bar Carter's claims.

The warden does not dispute that Carter, if competent, could contribute meaningfully to his claims. Instead, the warden (echoed by the United States) argues that any such contributions from Carter would *necessarily* be irrelevant because *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), confines federal review to the evidence presented to the state court. *See* Pet. Br. 24-27; U.S. Br. 28-29.

It is reasonable to assume that if there were *no* possibility that the district court could consider any information that the petitioner might contribute if competent, a stay based on incompetence would be at cross-purposes with AEDPA's goal of finality without any corresponding enhancement to the fairness of the proceeding. But the warden overreads *Pinholster*.

Pinholster held only that a federal court could not rely on new evidence in concluding that a state court decision was unreasonable. 131 S. Ct. at 1398. It did not hold that evidence presented in federal court could never be relevant to the adjudication of a habeas case. *See id.* at 1401 ("[S]tate prisoners may sometimes submit new evidence in federal court[.]"). For instance, as the warden and the United States acknowledge, *Pinholster* does not foreclose the consideration of new facts in cases in which a claim was not adjudicated on the merits in state court. Pet. Br. 30; U.S. Br. 29; *see Pinholster*, 131 S. Ct. at 1401 ("[N]ot all federal habeas claims by state prisoners fall within the scope of § 2254(d)[.]"). To prevent meritorious claims based on material unavailable at

the time of the state proceeding from being shut out of court, *cf. id.* at 1417-19 (Sotomayor, J., dissenting) (positing such a hypothetical), the Court recognized that a petitioner could present new evidence that transforms an existing claim into a new claim, never "adjudicated on the merits in State court proceedings" under 28 U.S.C. § 2254(d) and therefore subject to federal review. *Pinholster*, 131 S. Ct. at 1401 & n. 10 (responding to the dissent). And Justice Breyer, agreeing with the majority regarding the limitations on new evidence in federal court, observed that, even without a new claim, a petitioner "can always return to state court presenting new evidence not previously presented. If the state court again denies relief, he might be able to return to federal court to make claims related to the latest rejection." *See id.* at 1412 (Breyer, J., concurring in part and dissenting in part). As these examples show, *Pinholster* is not a categorical bar to the presentation of new evidence in federal court. Therefore, *Pinholster* does not categorically preclude an incompetency stay. Rather, like other procedural habeas doctrines, *Pinholster* merely narrows the universe of claims that would be "potentially meritorious" on federal habeas review, *Rhines*, 544 U.S. at 278, so as to justify a stay.

In this case, if Carter were competent and presented additional facts about his mental state at trial and the deficiencies of his counsel, the district court could stay the case pending exhaustion of new facts or claims in state court. *See Rhines*, 544 U.S. at 277-78; *see, e.g.*, *Cook v. Anderson*, No. 1:96-cv-424, 2011 WL 6780869, at *3-*4 (S.D. Ohio Dec. 22, 2011) (granting a *Rhines* stay in light of *Pinholster*); *Craddock v. Cain*, No. 11-655, 2012 WL 1580771, at

*4-*5 (E.D. La. Apr. 3, 2012) (same), *report and recommendation adopted*, 2012 WL 1580422 (E.D. La. May 4, 2012); *see also Conway v. Houk*, No. 2:07-cv-947, 2011 WL 2119373, at *3 (S.D. Ohio May 26, 2011) ("Without expressing an opinion on the propriety of such a procedure, the Court notes that, should Petitioner exhaust additional claims based on new facts in the state courts, then *Pinholster* would not preclude this Court's consideration of those facts."). Carter's lack of mental competence during the state post-conviction proceedings — his federal habeas petition explains that he was incompetent as far back as his original trial, J.A. 37-45 — would constitute "good cause," *Rhines*, 544 U.S. at 278, for his failure to exhaust previously.

If the state court subsequently applied a state procedural bar to claims based on additional facts Carter could provide if he were competent, Carter's mental incompetence during his original state proceedings could provide cause and prejudice to overcome the default on return to federal court. *See Holt v. Bowersox*, 191 F.3d 970, 974 (8th Cir. 1999); *Sena v. N.M. State Prison*, 109 F.3d 652, 654 (10th Cir. 1997). At that point, *Pinholster* would not bar the consideration of new facts, because the state court would not have decided the claim "on the merits." *Pinholster*, 131 S. Ct. at 1401 (quoting 28 U.S.C. § 2254(d)).

* * *

Taken together, the factors discussed — expert evidence supporting a finding of incompetence, the assertion of claims for which the petitioner's competent assistance is necessary, and the impact of relevant and timely-invoked procedural bars — will

ensure that, far from being "a powerful new mechanism for capital prisoners" that "give[s] every prisoner" a chance to derail the proceedings, Pet. Br. 29, the incompetency stay will remain a rarity in federal habeas litigation. According to a July 2012 Westlaw search, in the forty-five years since *Rees*, there are only five cases with reported decisions in which a federal court issued an indefinite stay in a habeas proceeding because the court found the petitioner incompetent (excluding stays overturned on appeal). *See* Pet. App. 15a; *Holmes*, 600 F.3d at 762-63; *Rohan*, 334 F.3d at 806, 819; *White v. Ryan*, No. 08-8139, 2012 WL 273707, at *1, *5 (D. Ariz. Jan. 31, 2012) (both sides stipulated to petitioner's incompetence); *Mulder v. Baker*, No. 3:09-CV-610, 2011 WL 4479771, at *22 (D. Nev. Sept. 26, 2011); *see generally* Br. for United States as Amicus Curiae on Pet. For Cert. 19, *Ryan v. Gonzales*, No. 10-930 (Feb. 2012) (noting, in urging the Court to deny certiorari, that "federal courts have stayed very few habeas cases on competency grounds"); Resp. Br. at Part II.C, *Gonzales*, No. 10-930 (U.S. July 20, 2012) (discussing infrequency of competency stays).[4] The

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[4] In *Gonzales*, the court of appeals ordered a temporary stay so that the district court could hold a competency hearing. *See In re Gonzales*, 623 F.3d 1242, 1244 (9th Cir. 2010). There has been no federal-court competency determination or indefinite stay.

Other habeas cases in which courts have found petitioners incompetent have resulted either in a temporary stay, *see United States ex rel. Fernandez v. Pfister*, No. 07 C 2843, 2011 WL 2746328, at *7 (N.D. Ill. July 14, 2011); or no stay at all where courts were able to adjudicate a petition after finding the petitioner incompetent to abandon it, *see, e.g.*, *Awkal v. Mitchell*, 559 F.3d 456, 462, 470 (6th Cir. 2009) (reciting

(*Footnote continued*)

paucity of such stays shows that permitting an incompetency stay in an appropriate case, such as this one, will not unleash a flood. *Rees* demonstrably did not.

In the very rare instances when an incompetency stay is warranted, it serves the vital function of ensuring that a habeas petitioner has a full and fair chance at federal review, and that the unfortunate and arbitrary circumstance of mental illness does not cost him that chance. *See Panetti v. Quarterman*, 551 U.S. 930, 946 (2007) (cautioning against interpreting procedural bars so as to "close our doors to a class of habeas petitioners" (quoting *Castro v. United States*, 540 U.S. 375, 380 (2003)) (internal quotation marks omitted)).

E. Staying a habeas proceeding because of incompetence does not contravene *Ford*.

The United States argues briefly that permitting a stay of habeas proceedings based on a petitioner's incompetence would supplant the test of *Ford v. Wainwright* for incompetence to be executed under the Eighth Amendment. U.S. Br. 12. This argument ignores the differences between the purposes and procedural settings of the two tests. Unlike the standard the Sixth Circuit applied here for competence in habeas proceedings — a standard focusing on the individual's understanding of the

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procedural history, including district court's finding of incompetence, and granting relief on the merits), *superseded en banc*, 613 F.3d 629, 634 (2010) (affirming district court's denial of petition on the merits); *In re Cockrum*, 867 F. Supp. 484, 494 (E.D. Tex. 1994) (noting that the court would proceed to adjudicate the merits).

proceedings and ability to assist counsel — competence to be executed requires a rational understanding of the punishment to be inflicted and the reason for it. *See Panetti*, 551 U.S. at 957-60; *Ford*, 477 U.S. at 422 (Powell, J., concurring in part and concurring in the judgment). An individual competent under one standard may be incompetent under the other, and vice versa. For instance, an individual might be impaired from communicating facts about his trial but nonetheless comprehend why he has been sentenced to death. Or an individual who can explain the facts necessary to his habeas claims might not perceive reality well enough to understand why he is being punished. Therefore, one standard cannot supplant the other: they are different tests for different purposes, and not all petitioners who qualify for a stay in one context would do so in the other.

Moreover, as demonstrated by the dearth of cases in which courts have stayed proceedings because of a petitioner's incompetence, showing incompetence to proceed with a habeas petition is not a simple matter. The assumption that the availability of incompetency stays will substantially swell the ranks of those who cannot be executed is unfounded.

F. In the competency context, an indefinite stay can be warranted, and *Rhines* is not to the contrary.

The warden and the United States recognize that an incompetency stay of *limited* duration would be permissible in certain circumstances, *see* Pet. Br. 31; U.S. Br. 29-31, but both insist that an *indefinite* stay is categorically impermissible, *see* Pet. Br. 32; U.S. Br. 30. This contention rests on a misreading of this

Court's decision in *Rhines* and disregards this Court's decision in *Rees*.

The warden cites *Rhines* for what he characterizes as an "emphatic command: Habeas 'petition[s] should not be stayed indefinitely.'" Pet. Br. 29 (quoting *Rhines*, 544 U.S. at 277) (alteration retained from the warden's brief); *see also id.* at 15, 30 (same characterization of *Rhines*). However, the warden's quotation from *Rhines* omits a crucial word that limits and places in context what the warden incorrectly presents as a categorical rule. The entire sentence from *Rhines* reads, "A *mixed* petition should not be stayed indefinitely." *Rhines*, 544 U.S. at 277 (emphasis added). *Rhines* does not stand for the proposition that an indefinite stay may never issue in any habeas case. Rather, it says only that an indefinite stay would be inappropriate *for the purpose of allowing exhaustion of claims in a mixed petition*, presumably because the purpose of that type of stay is to maintain the status quo pending a specific event (resolution of claims in state court) whose conclusion is easy to discern.

An incompetency stay is different. Despite a court's best efforts and testimony from the best experts, no one can know when, or whether, a petitioner will be restored to competence. Therefore, an indefinite stay can be warranted to ensure that mental illness does not deprive a person of his chance for a full and fair federal habeas hearing on claims that require his assistance. That the nature and purpose of an incompetency stay can justify a stay without a definitive end date is demonstrated, of course, by this Court's orders in *Rees v. Peyton*. *See supra* Part I.C; *cf. Medina v. California*, 505 U.S.

437, 448 (1992) (in the trial competency context, due process requires "suspension of the criminal trial until such time, *if any*, that the defendant regains the capacity to participate in his defense" (emphasis added)); *Riggins v. Nevada*, 504 U.S. 127, 145 (1992) (Kennedy, J., concurring in the judgment) ("If the defendant cannot be tried without his behavior and demeanor being affected in [a] substantial way by involuntary treatment, in my view the Constitution requires that society bear this cost in order to preserve the integrity of the trial process.").

Moreover, the distinction that the warden and the United States draw between a limited and an indefinite stay is difficult to maintain. If a habeas petitioner's mental competence is important enough to the litigation of his claims that a stay is warranted based on his incompetence, *see* U.S. Br. 29 (acknowledging the propriety of a limited stay where, for instance, "a capital prisoner's testimony or assistance might be crucial to a potentially meritorious habeas claim"); *cf.* Pet. Br. 31 (conceding such a stay is not necessarily foreclosed), the passage of a limited but arbitrary period of time should not itself change anything where the petitioner's condition has not improved. Thus, a stay for a stated period, renewable if the defendant remains incompetent at the end of that time, is little different as a practical matter from a stay with no fixed endpoint other than the restoration of the petitioner's competence. *Compare United States ex rel. Fernandez v. Pfister*, No. 07 C 2843, 2011 WL 2746328, at *1 (N.D. Ill. July 14, 2011) (granting one-year stay because of petitioner's incompetence); *with* Joint Status Report at 2, *Fernandez*, No. 07 C 2843 (N.D. Ill. June 4, 2012) (Dkt. Entry 139) (noting expert's

conclusion that petitioner remains incompetent, and position of petitioner's counsel that "[i]f, after a guardian is appointed, appointed counsel still cannot proceed with the habeas case, then a continued stay would be appropriate"). The distinction between what the Sixth Circuit envisioned in this case — a stay that will allow "all parties to remain actively involved and the court to monitor Carter's on-going condition," Pet. App. 14a — and a series of limited stays that are renewed as long as the petitioner remains incompetent, is a matter of form and not substance. Either circumstance would involve a stay because of incompetence, to be continued if the petitioner remains incompetent, or lifted if the petitioner has recovered.

The warden and the United States try to justify the limited/indefinite distinction by likening the mind of an incompetent habeas petitioner to a piece of lost evidence. *See* Pet. Br. 31; U.S. Br. 30. But to treat the habeas petitioner himself, whose life is at stake in his proceedings, like a malfunctioning computer drive, *see* Pet. Br. 31, ignores the fundamental role of an individual in his own case. A criminal defendant's participation in his own case is sufficiently important that this Court has recognized a constitutional right, with deep roots in the common law, not to be tried while incompetent. *See supra* Part I.B. This Court need not find constitutional implications here to see that the distinction between lost evidence and the defendant's own mind remains valid in post-conviction review. Although the likelihood that the defendant/petitioner has evidence of legal significance to contribute to the proceeding may diminish between trial and subsequent review stages, his fundamental interest in participating if

he has such evidence remains compelling: "[F]or peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." 4 Blackstone, *Commentaries* 24-25. And if that interest is compelling today, it will be equally so after a pre-established time period. Thus, the line between a limited and an indefinite stay is not a meaningful one when the issue is competence in habeas proceedings. The same reasons that would justify a limited stay because of incompetence would also justify an appropriately monitored, indefinite stay, tailored to the facts of the case and the claims asserted — precisely what the Sixth Circuit ordered the district court to devise on remand in this case. *See* Pet. App. 14a-15a. That remedy is consistent with *Rees*, the traditional discretion of habeas courts, and the common law.[5]

II. Carter Has Preserved His Alternative Ground For Affirmance, 18 U.S.C. § 3599.

Because courts have the inherent equitable power to impose stays as a matter of discretion, and staying this case is a proper exercise of discretion, this Court need not consider as an alternative ground for affirmance whether 18 U.S.C. § 3599 independently supports a stay — a question on which this Court did not grant certiorari in this case.

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[5] If the Court categorically rules out indefinite stays for incompetence, it should nonetheless allow the district court on remand to craft a narrower stay based on Carter's up-to-date prognosis and his potential role in the proceedings going forward.

However, Carter has raised this alternative ground for relief throughout his case by urging courts to apply *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003). *See* Pet. App. 91-94, 100; Br. of Appellee 15-19, *Carter v. Bradshaw*, No. 08-4377 (6th Cir. June 9, 2009). Under the rationale of *Rohan*, and for the reasons advanced by the respondent in *Ryan v. Gonzales*, No. 10-930, this Court should hold in *Gonzales* that 18 U.S.C. § 3599 justifies an incompetency stay for capital habeas petitioners where their assistance is necessary in order for their appointed counsel to represent them. If the Court so holds, the stay in Carter's case should be upheld under that statute.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Sixth Circuit remanding for the district court to determine the scope of an incompetency stay.

Respectfully submitted,

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REPLY BRIEF

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TERRY TIBBALS, Warden,

Petitioner,

v.

SEAN CARTER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF THE PETITIONER

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REPLY OF THE PETITIONER

For years, Respondent Carter asserted a statutory "right to competence" in "all proceedings . . . seeking collateral relief." J.A. 91. The district court agreed with him. So did the Sixth Circuit. Yet on the eve of review in this Court, Carter offers no defense of the proposition that has absorbed (and delayed) this case for a decade. He instead argues for the first time that district courts possess equitable discretion to stay habeas proceedings indefinitely due to concerns about a capital prisoner's mental state.

This eleventh-hour shift is unconvincing. Carter's position finds no support in the common law or this Court's cases. Moreover, his proposal—which permits indefinite stays whenever the prisoner's assistance is "necessary" to his claims—is overly simplistic and unworkable. Carter offers no standards, rules, or limitations to guide the exercise of such authority, nor does he justify the stay issued in his case. Finally, Carter's proposition carries tremendous significance. It would undercut AEDPA, swallow the Eighth Amendment's mental-incompetency standard, and grind capital litigation across the country to a halt.

Adjudicating the merits of Carter's claims, as the Warden urges, does not threaten the principles underlying the Great Writ. It respects them. State prisoners are entitled to relief "only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution." *Townsend v. Sain*, 372 U.S. 293, 312 (1963). But in this case, Carter obtained relief—the indefinite suspension of his capital sentence—without meeting that burden.

Such an outcome disrespects the limited role of federal habeas review.

One final word: This proceeding is not Carter's last chance at relief. If his mental state improves, the law allows him a forum to press claims that were previously undiscoverable. And if Carter does not recover, the law provides a mechanism to stop his execution. But speculation about these future events should not impede resolution of Carter's *existing claims*. Carter has attacked the validity of his capital conviction, the Warden is ready to defend it, and the federal courts are capable of resolving the dispute. This case should proceed.

A. Neither common law nor this Court's precedents sanction the indefinite postponement of a habeas proceeding due to the prisoner's incompetence.

At Carter's urging, the Sixth Circuit entered an open-ended stay of his habeas proceeding by recognizing a "statutory right" of competence for habeas petitioners. Pet. App. 6a. Instead of backing that rationale, Carter now defends the stay by invoking common-law traditions and inherent power. Neither of these new justifications holds sway.

1. Habeas courts had no authority at common law to stay the prisoner's sentence due to incompetence.

Carter frames his position as a rote application of the common-law incompetency rule that a defendant who becomes incompetent "shall not be indicted," "convicted," or "ordered for execution." 4 William Blackstone, Commentaries on the Laws of England 388-89 (1769). Federal courts, he asserts,

enjoy similar authority to stay their habeas proceedings due to concerns about the prisoner's competency.

Carter is wrong for two reasons. First, the common-law rule addressed only the duty and discretion of *trial courts* to suspend proceedings or judgments because of the defendant's incompetence. *See* 1 Matthew Hale, History of the Pleas of the Crown 35 (1736) (referring to "the judge before such respite of trial or judgment"). Carter's call to recognize the rule in federal habeas proceedings disregards its historical purpose and application.

The incompetency rule had a specific purpose at common law. Execution occurred within days of judgment. *See Ford v. Wainwright* 477 U.S. 399, 420 (1986) (Powell, J., concurring) ("[E]xecution often followed fairly quickly after trial."); Cresacre More, The Life of Sir Thomas More 376 (1828) (five-day period between More's conviction and execution). During that window, prisoners could petition the trial judge, who enjoyed broad authority to grant "arbitrary reprieves" "where the judge [wa]s not satisfied with the verdict, or the evidence [wa]s suspicious, or the indictment [wa]s insufficient . . . or any favorable circumstances appear[ed] in the criminal's character." Blackstone, *supra*, at 387. If the prisoner was incompetent, the common law also allowed the judge "in his discretion" to reprieve a capital sentence because the prisoner "might have offered some reason, if in his senses, to have stayed these respective proceedings." *Id.* at 389.

Blackstone had no occasion to discuss the application of the rule to later proceedings. "[C]riminal appeals were unknown to the common

law." Peter Marshall, A Comparative Analysis of the Right to Appeal, 22 Duke J. Comp. & Int'l L. 1, 4 (2011). And Blackstone's rationale lacks force in these settings. Appellate and post-conviction proceedings are backward looking, searching for error at the original trial. Because these courts enjoy no common-law discretion to grant "arbitrary reprieves," they have no comparable power to stay an incompetent prisoner's case.

Carter offers nothing to the contrary. Despite insisting that the common-law incompetency rule extends to "subsequent stages of the proceedings" (Resp. Br. 19), he fails to cite a single example where a court used it to postpone such a proceeding. And for good reason: Courts grappling with this question have declined to do so, confirming that the rule has no currency beyond the trial context. *See, e.g.*, *Dugar v. Whitley*, 615 So.2d 1334, 1335 (La. 1993); *Fisher v. State*, 845 P.2d 1272, 1277 (Okla. Crim. App. 1992); *State v. White*, 815 P.2d 869, 878 (Ariz. 1991); *People v. Newton*, 394 N.W.2d 463, 466 (Mich. Ct. App. 1986) (courts refusing to delay appeals due to incompetency allegations).

Carter's invocation of common law is flawed for a second reason. Whatever force the incompetency rule had in courts of general jurisdiction, it did not apply in habeas. Habeas courts possessed only limited authority. At common law, "a prisoner seeking a writ of habeas corpus could challenge only the jurisdiction of the court that had rendered the judgment under which he was in custody." *Wright v. West*, 505 U.S. 277, 285 (1992). "[A] judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement

was legal." *United States v. Hayman*, 342 U.S. 205, 211 (1952).

Habeas proceedings thus turned on a question of law: Did the judgment-issuing court have jurisdiction? "[I]f the return [of writ] were regular and legal, the party was without remedy." William Church, A Treatise on the Writ of Habeas Corpus 309 (1893). A habeas court at common law had no authority to investigate the prisoner's mental state, nor any reason to delay proceedings if such concerns arose.

Simply put, the common-law incompetency rule governed trial courts—not appellate courts, and certainly not habeas courts. The Court should refuse Carter's invitation to expand it to settings never envisioned by our juridical ancestors.

2. *Rees* did not recognize a court's inherent power to stay a habeas case due to the prisoner's incompetence.

Carter next argues that *Rees v. Peyton*, 384 U.S. 312 (1966), demonstrates "that federal courts[] [have] equitable discretion to stay habeas cases" when the "petitioner has become mentally incompetent." Resp. Br. 24. He is wrong.

Over the objections of his counsel, the prisoner in *Rees* tried to withdraw his petition for certiorari. Faced with that request, the Court instructed the district court to assess whether the prisoner "ha[d] capacity to appreciate his position." 384 U.S. at 314.

This was, in every sense, a standard waiver inquiry. When a criminal defendant waives an important right, courts will inquire whether his

decision is an "intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). *Rees* simply applied that practice to a habeas proceeding: Because the prisoner sought to waive his right to pursue habeas relief, the Court thought it prudent to determine whether his decision was knowing and intelligent.

Carter places great stock in what happened next. After the district court found the prisoner incompetent, this Court held the petition without action until 1995, when the prisoner died. According to Carter, this inaction ratified the inherent power of federal courts to stay a habeas petition indefinitely because of the prisoner's incompetence.

The historical record shows Carter's theory is implausible. Upon learning of the district court's finding, Virginia agreed that no execution could proceed. *See* Resp. Mem. at 3, *Rees v. Peyton*, Misc. No. 9 (Mar. 14, 1967). But the parties disputed the proper mechanism for resolving his pending certiorari petition. Faced with that disagreement, the Clerk contacted both parties and presented a proposal to hold the petition indefinitely.[1] His

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[1] A similar process occurred five years earlier. After the Court granted certiorari in *Anderson v. Kentucky*, 371 U.S. 886 (1962), psychiatrists concluded that the capital petitioner was incompetent. *See* Gabriel Chin, *Reaching Out To Do Justice*, 48 Hous. L. Rev. 197, 211 (2011). The Kentucky Attorney General then "propos[ed] that the Court continue the case indefinitely." *Id.* at 212. The Court agreed: "By joint agreement of the parties this case is continued indefinitely." *Anderson v. Kentucky*, 376 U.S. 940 (1964). Chief Justice Warren sent letters to the parties applauding their resolution. *See* Chin, *supra*, at 213.

memorandum to Chief Justice Warren indicated that "counsel for both parties d[id] not really present any objection to the procedure proposed in this case, but neither of them accept[ed] it with enthusiasm." Pet. Br. App. 2. The Court then entered a one-line order staying the case.

The Clerk's communication indicates that both parties grudgingly settled the dispute at his urging. Carter instead imagines that a formal resolution occurred (Resp. Br. 26), whereby the Clerk convened a conference, evaluated the parties' objections, and recommended a disposition—which the Court adopted without published explanation.

The Warden is not aware of any instance where the Court used such an informal procedure to decide a disputed issue—much less one implicating the delicate balance between state and federal courts. And even if the *Rees* Court exploited "inherent power" to enter an indefinite stay, no rule of practice was established. "Something more is needed than a few words of unrecorded talk between a judge and a prothonotary to compass that result." *Hill v. United States*, 298 U.S. 460, 466 (1936).

3. Carter offers no other authority for his position.

Beyond these romanticized depictions of common law and *Rees*, Carter presents little else.

He observes that the Sixth, Seventh, and Ninth Circuits have authorized indefinite stays of habeas proceedings if the prisoner is incompetent. But these courts held that a prisoner had "a *statutory* right to competence in his federal habeas proceedings." *Rohan v. Woodford*, 334 F.3d 803, 817 (9th Cir. 2003)

(emphasis added); *accord* Pet. App. 6a; *Holmes v. Buss*, 506 F.3d 576, 578 (7th Cir. 2007). Carter offers no defense of those holdings.[2] He instead evokes vague notions of "equitable authority" and "inherent power" to justify the indefinite stay of his case.

One of two things then must be true: either (1) the authors of *Rohan*, *Homes*, and *Carter* did not believe that "equitable discretion" would alone justify a stay; or (2) they overlooked the "simpler, narrower ground of decision" Carter now advocates, Resp. Br. 12. The first explanation is far more plausible.

This Court's cases cast similar doubt on Carter's theory. In *Ford v. Wainwright*, a capital prisoner suffered "paranoid schizophrenia" and was "no longer able to communicate. Pet. Br., 1986 U.S. S.Ct. Briefs Lexis 353, at *9. He urged the Court to postpone his execution, in part, to preserve his "right of access to collateral remedies" and opportunity "to disclose relevant facts that are known only to him." *Id.* at *52-53.

Justice Powell's controlling opinion rejected that formulation for Eighth Amendment purposes: "[T]he prohibition against executing the insane . . . as a way of preserving the defendant's ability to make arguments on his own behalf . . . has slight merit today." 477 U.S. at 419-20. At no point did he (or Justice Marshall, who penned a separate opinion)

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[2] Carter preserves an argument that 18 U.S.C. § 3599 affords him a right to an indefinite stay, citing the briefs in *Ryan v. Gonzales*, No. 10-930. But the *Gonzales* respondent (Br. 13) failed to defend that proposition.

consider whether federal courts could use "equitable discretion" to stay an execution on that ground.

In *Rector v. Clark*, 923 F.2d 570 (8th Cir. 1991) a capital prisoner claimed that his attorneys were constitutionally ineffective. Yet because of a brain defect, the prisoner "w[as] not able to recognize or understand facts which might be related to his case which might make his punishment unjust." *Id.* at 572. The Eighth Circuit refused to delay the prisoner's case and rejected his claim on the merits.

This Court denied certiorari. Justice Marshall, dissenting, urged the Court to consider whether the prisoner's execution could proceed under the Eighth Amendment when "mental incapacity render[ed] him unable to recognize or communicate facts." *Rector v. Bryant*, 501 U.S. 1239, 1239 (1991). Yet at no point did Justice Marshall argue that common law or inherent power alone authorized the federal courts to stay the execution.

Finally, in *Panetti v. Cockrell*, a capital prisoner alleged that he was incompetent at his state-court trial. When he reached federal habeas review, the prisoner suffered "severe disturbances in his thinking (and ability to communicate with others)." Pet. Br. 17 n.11, *Panetti v. Quarterman*, 2006 U.S. Briefs 6407 (Feb. 27, 2007). Notwithstanding those deficits, the district court, the Fifth Circuit, and this Court denied relief. *See Panetti v. Cockrell*, No. 01-50347, 73 Fed. Appx. 78 (5th Cir.), *cert. denied*, 540 U.S. 1052 (2003). The prisoner's current mental state did not emerge as an issue until later litigation. *See Panetti v. Quarterman*, 551 U.S. 930 (2007).

Ford, *Rector*, and *Panetti* involved the same situation now before the Court: An incompetent, non-communicative prisoner attempting to secure habeas relief. Yet no judge or justice broached the possibility of a stay based on "inherent authority" or "equitable discretion." That silence undermines Carter's claim that indefinite competency-based stays enjoy "long . . . recogni[tion] in the common law and the jurisprudence of this Court." Resp. Br. 18.

At bottom, Carter's call for an open-ended stay is a novel proposition, not an age-old principle. He fails to locate a single example—common-law or modern era—where a court invoked inherent authority to postpone a habeas action indefinitely due to concerns about the prisoner's competence.

B. Carter's test for obtaining an indefinite competency-based stay is meaningless.

Carter's lack of authority is not the only problem. His proposed standard—which authorizes indeterminate delay of a habeas proceeding where an incompetent prisoner's assistance is "necessary" for his claims—is no standard at all.

1. Carter proposes no standards or procedures for his competency test.

Carter first defends a trial court's ability to discern whether a "petitioner is genuinely incompetent." Resp. Br. 28.

The Warden agrees, with one caveat: Trial courts are perfectly capable of addressing competency questions *when* there are clear standards and procedures. For instance, if concerns arise about a federal criminal defendant's mental

state, district courts consult 18 U.S.C. § 4241. That law defines competence, articulates hearing procedures, and adopts strict time limits.

None of that exists here. Carter proposes no definition of "competency"—a troubling omission given the number of everyday occurrences (old age, depression, heart-disease medication, and the like) that may hinder a prisoner's ability to recall and communicate facts. Carter's standard would afford courts wide discretion to stay proceedings in those instances.

Carter also offers little by way of procedure. He says that "district courts . . . '*may* employ section 4241'" to assess the prisoner's competency, "but need not always" do so. Resp. Br. 15. Nor does Carter's framework mandate a stay when a prisoner is adjudicated incompetent. He simply indicates that "stays must be available, so that district courts can exercise their discretion." *Id.*

Therein lies the danger. Carter leaves every step of the inquiry—the competency standard, evidentiary procedures, and duration of a stay—up to each district court as part of its "inherent authority 'to stay proceedings and manage its docket as it sees fit.'" Resp. Br. 16 (citation omitted). This Court has never endorsed such a limitless and arbitrary regime when it comes to criminal judgments. Habeas litigation, with its emphasis on federalism, finality, and comity, is a particularly poor place to start.

2. Carter has not explained why his assistance is "necessary" to resolve his existing claims.

In truth, Carter proposes just one guidepost: Before granting an indefinite competency-based stay of a habeas proceeding, a district court must determine that the prisoner's "assistance is necessary for his claims." Resp. Br. 30.

According to Carter, a prisoner's assistance is "necessary" when he "raises claims that depend on factual matters within his own knowledge but not contained within the record." *Id.* By contrast, "a purely record-based claim . . . is less likely to require a stay."[3] *Id.*; *accord* Reply at 6, *Carter v. Bradshaw*, No. 02-cv-524 (N.D. Ohio) (Doc. 196) ("[C]ounsel does not need to be able to communicate with Carter about purely record claims.").

But Carter cannot meet his own test. Because his claims are record-based, Carter's assistance is not "necessary" for their adjudication.

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[3] Amici separately claim that "[a] habeas petitioner may have critical information to offer his counsel even where his habeas proceedings will not encompass further on-the-record fact-finding." Retired Judges Br. 8-9; ACLU Br. 18. These assertions are misplaced. When the habeas inquiry is confined to the record, any new facts, perceptions, or contextual insights offered by the petitioner in federal court will be irrelevant.

The American Bar Association believes that a stay is permissible whenever the prisoner is incapable of "rational communication and decision-making" with his attorney. ABA Br. 18. Carter and the Sixth Circuit wisely eschew that extreme position, conceding that certain claims may proceed notwithstanding the prisoner's mental state. Resp. Br. 30; Pet. App. 13a.

a. Incompetence to stand trial.

The "most relevant facts" to this claim, Carter argues, are his "own experiences, thoughts, and capacities of perception and expression at the time of his trial in 1998." Resp. Br. 32. If restored to competence, Carter might offer testimony "to shed light on whether he was then impaired." *Id.* at 33.

But Carter skips a step. AEDPA forbids presentation of new evidence on this claim.

A criminal defendant's "competency to stand trial" is a "factual issue." *Thompson v. Keohane*, 516 U.S. 99, 111 (1995). Here, the state trial court convened two hearings, weighed expert testimony, and judged Carter competent. The Ohio Supreme Court affirmed this factual finding on appeal.

Carter is free to challenge this determination as "unreasonable" on habeas review, but he must do so using only "the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). AEDPA sharply curtails the federal courts' ability to revisit the state court's factual finding. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1415 (2011) (Sotomayor, J., dissenting) ("§ 2254(d)(2) . . . expressly directs district courts to base their review on 'the evidence presented in the State court proceeding.'").

Because the federal courts may not entertain new evidence about his mental state at the time of trial, any additional information Carter might reveal would be inadmissible.

b. Ineffective assistance.

Carter also contends that his participation is "necessary" to resolve his ineffective assistance claims. That assertion fails for two reasons.

First, Carter again ignores AEDPA. The Ohio court of appeals rejected these claims on the merits in post-conviction review. Carter does not (and could not) dispute this. Therefore, to obtain relief, he must demonstrate that the state court's decision "was contrary to," or "an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). This inquiry is "limited to the record that was before the state court." *Pinholster*, 131 S. Ct. at 1398. "[E]vidence later introduced in federal court is irrelevant to § 2254(d)(1) review." *Id.* at 1400.

Carter points out that "*Pinholster* does not foreclose the consideration of new facts in cases in which a claim was not adjudicated on the merits in state court." Resp. Br. 38. While true, that observation is irrelevant. Because Carter's ineffective assistance claims *were adjudicated on the merits in state court*, AEDPA prohibits new evidence in his habeas proceeding.

Second, any new information from Carter is irrelevant to the *Strickland* analysis in his case. When resolving ineffective assistance claims, courts "reconstruct the circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Of note, courts measure counsel's performance next to the evidence that was "reasonably available" at the time

of trial. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (citation omitted).

In this case, defense counsel were on their own. Carter "would not cooperate" and "would not discuss any aspects of the case or his personal life with his attorneys." *State v. Carter*, No. 99-T-133, 2000 Ohio App. Lexis 5935, at *10 (Ohio Ct. App. 2000).

That did not let counsel off the hook. They still had an independent obligation to investigate and present favorable evidence. *See Rompilla v. Beard*, 545 U.S. 374, 381 (2005). But counsel could not access Carter's personal knowledge. That limitation mediates the *Strickland* inquiry: Any information Carter might reveal in 2012 (were his condition to improve) would carry no weight in an evaluation of counsel's performance because such information was not "reasonably available" in 1998.

In short, Carter fails to explain why his assistance is "necessary" to litigate these claims. Any new testimony about his knowledge, thoughts, or experiences would be inadmissible under AEDPA and irrelevant under *Strickland*.

3. The Court should reject speculation that Carter's assistance might be "necessary" to unearth new claims.

In his final entreaty for a stay, Carter does a sleight of hand, ducking the record-based nature of his existing claims and instead urging delay of the proceeding because his assistance may be "necessary" to discover new facts and claims down the road.

The argument goes like this: "*Pinholster* does not foreclose the consideration of new facts in cases in which a claim was not adjudicated on the merits in state court." Resp. Br. 38. Carter imagines that he might—were his condition to improve—identify "new evidence that [would] transform[] an existing claim into a new claim." *Id.* at 39. If that occurred, Carter could request a "stay [of] the case pending exhaustion of new facts or claims in state court." *Id.* And if the state court then dismissed the new claim on procedural grounds, Carter could return to federal court, argue "cause and prejudice," and proffer new evidence. *Id.* at 40. To preserve that distant contingency, Carter urges a stay of this proceeding.

Long story short: Carter asks to postpone adjudication of his *existing habeas claims* because, at some future point, he might regain competence, identify fresh evidence, and assert *new habeas claims*.[4] This Court should decline that extraordinary invitation. Carter has not cited any authority that permits a district court to postpone consideration of a prisoner's current claims based on vague conjecture that he might advance new claims in the future.

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[4] The ACLU urges a stay not just when the prisoner's assistance is "necessary" to his claims, but whenever the prisoner's assistance "c[ould] contribute . . . in the process of federal habeas review." ACLU Br. 32. It then posits examples of possible contributions—culling through state records, explaining state-court rulings, and arguing "cause and prejudice." This standard is even less bounded than Carter's; a habeas attorney could always conceive some scenario for his client's involvement.

Worse, Carter offers no guidance on how to evaluate the likelihood of such an occurrence. He suggests courts examine "the type of claims at issue" and "the proffer of petitioner's counsel regarding additional facts." Resp. Br. 31. But that inquiry would be an empty formality. To obtain a stay, the habeas attorney could simply assert that his client's assistance could be "necessary" to some yet-to-be-identified future claim.[5] A court would have no way to test the accuracy of that assertion.

Finally, AEDPA already contemplates a procedure for prisoners who discover new claims and evidence. If Carter ever identifies a new claim, he can request permission to file a second habeas petition under 28 U.S.C. § 2244(b). Accordingly, the possibility that Carter might raise future claims is no justification for delaying resolution of his existing claims.

All told, Carter's position suffers three flaws: (1) he offers no meaningful standards or procedures for competency-based stays; (2) his assistance is not necessary to resolve his current claims, all of which are record-based; and (3) his arguments about future claims turn on speculation. Before a federal court undertakes the dramatic step of postponing a habeas action indefinitely (and with it, a state court's criminal judgment), the court should demand far more than this.

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[5] Take a standard penalty-phase *Strickland* claim: Counsel could follow Carter's lead and speculate that his client's "assistance is needed to identify other witnesses who might have helped humanize him for the jury, and to explain what other leads he gave or could have given trial counsel." Resp. Br. 34.

C. Any stay of a habeas proceeding must be limited in duration.

Although Carter's common-law arguments and proposed test are misplaced, the Warden acknowledges the federal courts' traditional "authority to issue stays." *Rhines v. Weber*, 544 U.S. 269, 276 (2005). Courts exercise that authority to delay habeas cases for *limited* periods to allow exhaustion of state-court remedies, to await appellate court guidance, or to authorize additional discovery. Granting a prisoner a discrete window to undergo psychological treatment—a period of months, not years or decades—would be consistent with that practice. The stay would afford the prisoner an opportunity to regain his faculties and participate in his lawsuit, but would not "drag[] out indefinitely the[] federal habeas review." *Id.* at 278.

Carter insists that only an indefinite stay will preserve an incompetent prisoner's ability to secure habeas relief. But he is mistaken. Federal law already contemplates a forum for prisoners to litigate previously undiscovered claims. Carter's regime, by contrast, would offend AEDPA, displace *Ford v. Wainwright*, and upset habeas litigation across the country.

1. AEDPA prohibits indefinite stays.

In *Rhines*, this Court examined a district court practice of staying a habeas proceeding while the prisoner exhausted his state remedies. Although the Court endorsed the procedure, it expressed unease with habeas stays and emphasized that "the district court's discretion in structuring the stay is limited by

the timeliness concerns reflected in AEDPA." 544 U.S. at 277.

The Court then announced that habeas proceedings "should not be stayed indefinitely." *Id.* Otherwise, "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death," thereby "frustrat[ing] AEDPA's goal of finality." *Id.* at 277-78. The rationales animating *Rhines* carry the same force here.

Carter retorts that his circumstance is "different": "[A]n indefinite stay can be warranted," he says, "to ensure that mental illness does not deprive a person of his chance for a full and fair federal habeas hearing on claims that require his assistance." Resp. Br. 44.

Not so. If Carter's condition improves, and if Carter then identifies a new claim, he would need to return to state court. *See* 28 U.S.C. § 2254(b)(1). If unsuccessful, Carter could then ask the Sixth Circuit for permission to file a second habeas petition. He would need to establish that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." *Id.* § 2244(b)(2)(B)(i). And he would have to demonstrate merit to his new claim—that, but for the alleged error, the jury would have acquitted him on the murder charge or the death sentence. *Id.* § 2244(b)(2)(B)(ii).

All told, Congress addressed the circumstance that Carter posits. Where a prisoner articulates a claim that was undiscoverable during his first habeas proceeding, § 2244 offers him a pathway to

restart litigation. Prisoners often invoke this provision after they unearth new evidence (such as *Brady* material) or identify new claims (like an *Atkins* challenge). But Carter's worldview would render this statute irrelevant. An incompetent prisoner would never face the prospect of a second or successive petition; he could simply obtain an indefinite stay of his first petition based on averments that he *might* articulate something new in the future.

Carter also invokes *Rees* for the idea that "incompetency . . . can justify a stay without a definitive end date." Resp. Br. 44. As explained above, *Rees* did no such thing. Furthermore, the *Rees* Court operated in a different era, when habeas review of state criminal judgments was far more flexible and imposing. Congress "work[ed] substantial changes" to that structure when it enacted AEDPA. *Felker v. Turpin*, 518 U.S. 651, 654 (1996). Whatever authority courts once enjoyed, AEDPA now "circumscribe[s] their discretion" and prohibits indefinite stays of habeas proceedings. *Rhines*, 544 U.S. at 276.

2. Carter's indefinite-stay regime would undercut *Ford v. Wainwright*.

Ford "prohibits a State from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 410. If a court finds the prisoner incompetent, the State must suspend his capital sentence until the "petitioner is cured of his disease." *Id.* at 425 n.5 (Powell, J., concurring).

Carter seeks the same relief here—"a stay with no fixed endpoint other than restoration of [his]

competence." Resp. Br. 45. Yet his request end runs *Ford* in three significant ways.

First, a *Ford* stay is grounded in the Eighth Amendment, whereas Carter seeks suspension of his capital sentence based on mere equitable considerations. Stated simply, he desires the same outcome as *Ford*, but sidesteps the need to prove a constitutional violation.

Second, a prisoner advancing a *Ford* claim must demonstrate that he cannot rationally understand "the punishment [he is] about to suffer and why [he is] to suffer it." *Ford*, 477 U.S. at 422 (Powell, J., concurring). Justice Powell's opinion rejected a description of incompetence that encompassed "the defendant's [in]ability to make arguments on his own behalf." *Id.* at 419. Yet in this case, Carter alleges incompetence using the concept that Justice Powell dismissed. He seeks an indefinite stay because he cannot "identify, recall, and communicate relevant facts." Resp. Br. 30.

Third, a prisoner must exhaust a *Ford* claim in state court. *See Panetti*, 551 U.S. at 946. If unsuccessful, he can return to federal court under AEDPA's rubric. But Carter has pressed his allegations of post-conviction incompetence directly to the federal courts, bypassing these limitations.

Although Carter disclaims any intent to "supplant the test of *Ford v. Wainwright* for incompetence" (Resp. Br. 42), his framework undermines *Ford* at every turn—a reduced burden of proof, a broad and flexible definition of competence, no exhaustion, and no AEDPA. Going forward,

capital prisoners will readily select this lenient forum to litigate questions of competence.

The amici are more candid with their objectives. The American Bar Association believes that a prisoner may not be executed "if, as a result of mental illness or mental retardation, [he] lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or the court." American Bar Ass'n Crim. Justice Standard § 7-5.6 (1987).

The American Psychiatric Association adopts the same view: "A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity . . . to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims." APA Br. Add. 1. The APA further believes that federal courts in this circumstance should "reduce the prisoner's sentence to a lesser punishment," rather than suspending the sentence (as *Ford* contemplates). *Id.* at 2.

In other words, these organizations advocate the expansion of *Ford* to prisoners like Carter who have memory and communication deficits. Justice Marshall urged the same view in his *Rector* dissent: "[A] strong argument can be made that Justice Powell's answer to this open question [in *Ford*] is the wrong one." 501 U.S. at 1241.

If Carter and his amici wish to expand the Eighth Amendment in this fashion, they should make the request and litigate that claim. But the

Court should dismiss their effort to displace *Ford* tacitly, using vague appeals to inherent power and equitable discretion.

3. Carter's indefinite-stay regime would upend habeas litigation.

As a final matter, any scheme that sanctions indefinite stays of federal habeas proceedings will have great consequences. While Carter dismisses these concerns as "unjustified," the Court has repeatedly voiced them. "[T]he potential for false claims and deliberate delay in this context is obviously enormous." *Ford*, 477 U.S. at 429 (O'Connor, J., concurring in judgment). Because capital prisoners benefit from any effort that "prolong[s] their incarceration," *Rhines*, 544 U.S. at 277-78, each of them will rush to claim incompetence and request a stay.

What is more, every competency claim will look colorable at the outset. The district court here ordered an evaluation after "Carter . . . refused to meet with his attorneys" and his attorneys expressed concern that "Carter could not understand the proceedings or assist counsel." Pet. App. 8a. Any prisoner can replicate that and trigger a similar inquiry. *See* Hale, *supra*, at 35 ("[T]here may be great fraud in this matter.").

Finally, administration of this ad hoc system will be incredibly time consuming. A prisoner can make serial incompetency claims during his litigation. Because "the prisoner can claim that he has become insane sometime after the previous determination," the issue "can never be conclusively and finally determined. *Ford*, 477 U.S. at 429

(O'Connor, J., concurring in judgment). District courts will also face a long list of decisions—what procedures to employ, which claims can go forward, what medications the State can forcibly administer, how frequently must the prisoner be reevaluated, and when should a stay be lifted. Each dispute will spawn a separate hearing, ruling, and collateral appeal—further delaying the day when a court can examine the prisoner's habeas claims.

Carter and his amici write off these concerns. First, they insist that district courts can detect malingering. *See* Resp. Br. 28; APA Br. 12. That assurance seems dubious when (as discussed above) Carter has failed to define competency or offer procedures for courts to use. In the meantime, sorting through the claims of Ohio's 146 capital inmates will cause considerable delay and drain the finite pool of mental-health resources available to prisoners.

Second, Carter's amici trust that courts will quickly resolve post-conviction incompetency claims. *See* Retired Judges Br. 12. That has not been the Warden's experience. The district court here issued its competency finding six years after Carter's attorneys first flagged the issue. Other states have had similar experiences. *See* Ariz. Br. 5 (unresolved competency motion first raised in 2006); Utah Br. 6-8 (cataloging examples of delay).

Third, the amici "believe that district courts will revisit the stay order periodically," following "the approach that this Court took in *Rees*." Retired Judges Br. 14-15. But *Rees* is no template: "[T]here was evidently no regular monitoring or evaluation of Rees's situation to determine if the case could . . .

proceed," even though the Clerk recommended such inquiry on several occasions. Gabriel Chin, *Reaching Out To Do Justice*, 48 Hous. L. Rev. 197, 237-38, 263 (2011). As a result, the Court was unaware of a 1985 interview where the prisoner admitted responsibility for his murders or a 1987 report indicating that the prisoner's "mental condition ha[d] substantially improved." *Id.* at 237. The Court instead kept the stay in place until his death in 1995.

All told, Carter's indefinite-stay scheme will be no model of order and efficiency. It is "an anomalous monkey wrench thrown into the capital-litigation process." App. 26a (Rogers, J., dissenting).

CONCLUSION

For these reasons, the Court should reverse the judgment below.

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AMICUS CURIAE BRIEF

Nos. 10-930 and 11-218

In the Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
PETITIONER

v.

ERNEST VALENCIA GONZALES
(CAPITAL CASE)

TERRY TIBBALS, WARDEN, PETITIONER

v.

SEAN CARTER
(CAPITAL CASE)

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE NINTH AND SIXTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 3599(a)(2), which provides that an indigent capital inmate pursuing federal post-conviction relief "shall be entitled to the appointment of one or more attorneys," entitles such a prisoner to a stay of his federal postconviction proceedings if he is not competent to assist his counsel (No. 10-930).

2. Whether this Court's decision in *Rees* v. *Peyton*, 384 U.S. 312 (1966), affords a capital inmate a "right to competence" in federal postconviction proceedings and entitles such a prisoner to a stay of those proceedings if he is not competent to assist his counsel (No. 11-218).

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In the Supreme Court of the United States

No. 10-930

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BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

Ryan v. *Gonzales*, No. 10-930, presents the question whether 18 U.S.C. 3599(a)(2), which provides that an indigent capital prisoner pursuing federal postconviction relief "shall be entitled to the appointment of one or more attorneys," entitles such a prisoner to a stay of his federal postconviction proceedings if he is not competent to assist his counsel. *Tibbals* v. *Carter*, No. 11-218, pres-

ents the question whether this Court's decision in *Rees* v. *Peyton*, 384 U.S. 312 (1966), affords a capital inmate a "right to competence" in federal postconviction proceedings and entitles such a prisoner to a stay of those proceedings if he is not competent to assist his counsel. Although these cases arise on federal habeas review of state convictions under 28 U.S.C. 2254, federal capital prisoners challenging the legality of their detention under 28 U.S.C. 2255 (2006 & Supp. II 2008) also have a statutory right to counsel. See 18 U.S.C. 3599(a)(2). Furthermore, if the Court were to conclude that *Rees* affords state capital prisoners a right to competence in federal postconviction proceedings, that holding would presumably extend to federal capital prisoners. The United States therefore has a substantial interest in the Court's resolution of the questions presented. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of *Gonzales*, No. 10-930.

STATEMENT

A. *Ryan* v. *Gonzales*, No. 10-930

1. In 1990, respondent Gonzales stabbed to death Darrel Wagner and severely injured Deborah Wagner while he was burglarizing their home. *State* v. *Gonzales*, 892 P.2d 838, 842 (Ariz. 1995), cert. denied, 516 U.S. 1052 (1996). His first trial for felony murder and other offenses resulted in a hung jury. *Id.* at 842-843; Pet. App. C10. Before retrial, Gonzales, acting pro se, unsuccessfully moved to disqualify the trial judge based on adverse rulings and on-the-record comments from the first trial. Pet. App. C10-C12. After a retrial, Gonzales was convicted on all counts. *Id.* at C12; *Gonzales*, 892 P.2d at 842-843. Before sentencing, Gonzales again unsuccessfully moved to disqualify the trial judge. Pet.

App. C12. The trial court sentenced Gonzales to death for the felony-murder conviction and imposed prison terms for the other counts. *Gonzales*, 892 P.2d at 843.

Gonzales's appellate counsel raised several issues on direct appeal, including the judicial-bias claim. *Gonzales*, 892 P.2d at 843. The Supreme Court of Arizona rejected the judicial-bias argument and affirmed. *Id.* at 843, 847-848, 852. This Court denied certiorari.

After the judgment became final, Gonzales sought state postconviction review. Pet. App. B3. His asserted grounds included a judicial-bias claim. *Id.* at C15. The state courts denied relief. *Id.* at B3.

2. In 1999, Gonzales filed a petition for federal habeas corpus relief pursuant to 28 U.S.C. 2254. Pet. App. B3. The Office of the Federal Public Defender was appointed to represent him pursuant to 18 U.S.C. 3599(a)(2), which provides that in federal postconviction proceedings "seeking to vacate or set aside a death sentence" imposed by either a state or a federal court, "any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services." Counsel's appointment covers not only the district-court proceedings, but also additional proceedings, including "applications for stays of execution and other appropriate motions and procedures," as well as "such competency proceedings and proceedings for executive or other clemency as may be available." 18 U.S.C. 3599(e).

In 2000, Gonzales filed a federal habeas petition raising 60 claims, including a judicial-bias claim. Pet. App. B3, C10. He later withdrew 13 claims so that he could pursue them in state court. *Id.* at C2. His renewed mo-

tion for state postconviction relief included a claim that he was not competent to assist his postconviction counsel. *Id.* at B3. The state court rejected that claim as noncognizable. *Id.* at B3-B4.

3. a. In 2006, after the case had returned to federal court, Gonzales's counsel moved for a competency determination and a stay. Pet. App. A2, B5. Counsel relied on *Rohan* v. *Woodford*, 334 F.3d 803 (9th Cir.), cert. denied, 540 U.S. 1069 (2003), in which the court of appeals had held that "where an incompetent capital habeas petitioner raises claims that could potentially benefit from his ability to communicate rationally, refusing to stay proceedings pending restoration of competence denies him his statutory right to assistance of counsel" provided by 18 U.S.C. 3599(a)(2). *Rohan*, 334 F.3d at 819; Pet. App. B5. Counsel asserted that "due to a progressive deterioration in Gonzales's mental health he had lost the ability to rationally communicate with his counsel and assist them" and that his "assistance was essential to a number of his remaining habeas claims." Pet. App. A3.

The district court permitted two mental-health experts to examine Gonzales, but they reached conflicting conclusions. Pet. App. C3. Gonzales's expert concluded that Gonzales was not competent to understand his current legal situation or to assist counsel and that there was a good chance he would remain incompetent even if medicated. *Id.* at C4. The State's expert concluded that Gonzales was competent and was faking his symptoms, noting that Gonzales had "verbalized his desire to be found incompetent, (and thereby delay or avoid [execution])." *Id.* at C3-C4. The State's expert could not, however, exclude the possibility of a mental disorder, and

she recommended a period of observation, and medication if necessary. *Id.* at C4.

At the end of a 90-day assessment at the Arizona State Hospital, the supervising psychologist concluded that Gonzales had a "genuine psychotic disorder" and was "currently unable to communicate rationally for any extended period of time." Pet. App. C5. The psychologist became convinced that Gonzales's symptoms were genuine after observing improvement when Gonzales was put on antipsychotic medication. *Ibid.* Medication, however, had been discontinued at Gonzales's request, after he complained of side effects including back pain and restlessness. *Id.* at B5-B6, C5.

b. The district court denied Gonzales's request for a stay and a competency determination. Pet. App. C29. The court concluded that incompetence would not entitle Gonzales to a stay of the proceedings. *Id.* at C7-C29. The court explained that Gonzales's "properly-exhausted claims are record-based and/or resolvable as a matter of law, irrespective of [his] capacity for rational communication with counsel." *Id.* at C27-C28; see *id.* at C7-C27. With respect to the judicial-bias claim in particular, the court observed that the record "is fully developed"; that "additional, relevant facts do not exist that are within [Gonzales's] private knowledge"; and that, in any event, Gonzales's failure to allege or prove such facts in state court precluded further factual development in federal court. *Id.* at C16 (citing, *inter alia*, 28 U.S.C. 2254(e)(2)).

Because the court concluded that none of the exhausted claims could benefit from Gonzales's assistance, it did not reach the issue of whether Gonzales was, in fact, sufficiently competent or whether he could be medicated to competence. See Pet. App. C6, C28-29. The

court noted, however, that the record indicated Gonzales possessed a limited capacity for rational communication, which likely could be maximized through the use of antipsychotic medication. *Id.* at C28 & n.14.

4. Gonzales asked the court of appeals for an emergency stay of the district-court proceedings and an emergency writ of mandamus. Pet. App. E1-E2. The court granted a temporary stay and ordered briefing. *Ibid.*; see *id.* at F1-F2; *id.* at G1-G2. It then stayed the appellate proceedings pending resolution of *Nash* v. *Ryan*, 581 F.3d 1048 (9th Cir. 2009), cert. dismissed, 130 S. Ct. 1757 (2010). Pet. App. H2. The court later held in *Nash* that "the statutory right to competence in capital habeas cases that we recognized in *Rohan* applies to appeals," such that a prisoner "who lacks the ability to communicate rationally, and who seeks to raise claims on appeal that could potentially benefit from such communication is entitled to a stay of the appeal until [he] is found competent." 581 F.3d at 1055.

In October 2010, the court of appeals granted a writ of mandamus, holding that Gonzales "is entitled to a stay pending a competency determination." Pet. App. A2, A9. The court reasoned that *Nash* foreclosed the district court's conclusion "that a stay under *Rohan* is categorically unavailable when a capital habeas petitioner's claims consist only of record-based or legal questions." *Id.* at A5. The proper "claim-specific inquiry," the panel stated, "'should be whether rational communication with the [prisoner] is essential to counsel's ability to meaningfully prosecute'" the claim. *Ibid.* (quoting *Nash*, 581 F.3d at 1054).

The court concluded that Gonzales's judicial-bias claim satisfied the test. The court noted that Gonzales "had eleven different attorneys over the course of his

trial and sentencing, and was self-represented for part of that time." Pet. App. A5. The court stated that Gonzales's judicial-bias claim "centers on events regarding which 'counsel may need to communicate with [Gonzales] to understand fully the significance and context' of key facts so that counsel can pursue the most persuasive arguments." *Ibid.* (quoting *Nash*, 581 F.3d at 1053) (internal alterations omitted).

B. *Tibbals* v. *Carter*, No. 11-218

1. In 1997, respondent Carter raped his adoptive grandmother and stabbed her to death. *State* v. *Carter*, 734 N.E. 2d 345, 347-349 (Ohio 2000) (*Carter I*). Following his indictment on aggravated murder and other charges, three experts examined Carter to determine whether he was competent to stand trial. *Id.* at 355. One expert concluded that Carter was unable to assist in his own defense; the other two found him competent. *Id.* at 355-356. After the trial court held two hearings and found Carter competent, a jury convicted him of aggravated murder and other charges. *Id.* at 350, 355-356. The court sentenced Carter to death for the aggravated murder conviction and prison terms for the other counts. *Id.* at 350. Carter's appellate counsel raised several issues on direct appeal, including a challenge to the trial court's competency finding. *Id.* at 355-356. The Ohio Supreme Court rejected Carter's competency argument and affirmed. *Id.* at 356, 360. The court also conducted an independent review of Carter's sentence, including the mitigation evidence presented at trial, and concluded that the death penalty was appropriate. *Id.* at 359-360.

Carter sought postconviction relief in state court. He asserted that his attorneys had "failed to develop a complete record to show that he was incompetent to stand

trial because his paranoid personality did not permit him to trust, or therefore consult with and aid, his lawyers." *State* v. *Carter*, No. 99-T-0133, 2000 Ohio App. LEXIS 5935, at *10 (Ohio Ct. App. Dec. 15, 2000) (*Carter II*). He further asserted that "trial counsel did not properly prepare for the penalty phase of the trial." *Id.* at *8.

The trial court denied relief and the state appellate court affirmed. The appellate court stated that Carter's "inability or unwillingness to aid his attorneys in the defense of his case is well-documented in the record" and that nothing in Carter's petition or brief "raise[d] new grounds or point[ed] to anything outside the record to demonstrate that he is entitled to relief or a hearing." *Carter II*, 2000 Ohio App. LEXIS 5935, at *13. The court further stated that Carter's claim of ineffective assistance during the penalty phase was "not supported by the record" and that Carter "did not submit any evidentiary documents or point to any evidence outside of the record that would indicate that he was entitled to relief or a hearing on th[at] claim." *Id.* at *10.

2. In 2002, Carter's lawyers filed a federal habeas corpus petition pursuant to 28 U.S.C. 2254. Pet. App. 3a, 28a. They later filed a motion seeking a competency determination and a stay of the proceedings. *Id.* at 27a.

The district court held a competency hearing, during which Carter called two experts. Pet. App. 29a-33a. Dr. Robert Stinson testified that Carter suffered from schizophrenia, as well as depressive disorder and a personality disorder. *Id.* at 30a. He testified that the schizophrenia distorted Carter's inferential thinking, affected his communication, and prevented him from developing "a factual understanding of the proceedings" or from "truly understand[ing] the adversarial nature of

the proceedings." *Id.* at 30a-32a. Dr. Stinson further testified that Carter believed he could not be executed unless he volunteered. *Id.* at 31a-32a. Dr. Stinson's prognosis for Carter's return to lucidity was "poor," based on his observation that, even with powerful antipsychotic medication, Carter still experienced several symptoms of schizophrenia. *Id.* at 31a. Dr. Michael Gelbort testified that Carter's "thinking skills are fragmented and distracted" and that, while Carter could provide "basic assistance, * * * it's not worth a whole lot of time or effort on his attorneys' part because his cognitive capabilities are so limited." *Id.* at 32a-33a.

The State's expert, Dr. Phillip Resnick, agreed that Carter had schizophrenia, but concluded that he understood the nature of the murder conviction and the punishment and met "the minimum standard [of ability to assist defense counsel] because he [could] speak rationally and convey information," although he could not elaborate on his responses. Pet. App. 34a-35a.

The district court applied the Ninth Circuit's decision in *Rohan*, *supra*, to Carter's claims. Pet. App. 42a-48a. The court identified several exhausted claims that "potentially could benefit from Carter's assistance," including claims of ineffective assistance of trial and appellate counsel (for failure to adequately develop and pursue the competency claim) and ineffective assistance of counsel during the penalty phase. *Id.* at 42a-43a. The court next considered whether petitioner was competent to assist his counsel with litigation of those claims and concluded he was not. *Id.* at 44a. The court found that although Carter's capacity to understand his position and the proceedings was "debatable," his inability to assist counsel in developing his claims was "clear-cut." *Id.* at 44a-47a. The court disposed of the case by dis-

missing Carter's habeas petition without prejudice and prospectively tolling the one-year limitations period for filing a federal habeas petition, see 28 U.S.C. 2244(d), "until such time as [Carter] is competent to proceed with [the] litigation." Pet. App. 53a.

3. a. The court of appeals amended the district court's judgment. Pet. App. 1a-15a. The court concluded that the district court had not abused its discretion by holding a competency hearing and finding Carter incompetent. *Id.* at 8a-9a. The court acknowledged that capital prisoners "do not enjoy a constitutional right to competence" in federal postconviction proceedings. *Id.* at 4a. The court read this Court's decision in *Rees* v. *Peyton*, 384 U.S. 312 (1966), however, to afford capital prisoners a statutory right to competence during federal postconviction proceedings, grounded in the federal competency-hearing statute, 18 U.S.C. 4241. Pet. App. 4a-9a. The court stated that this Court had "appl[ied] section 4241 to habeas actions" in *Rees* and had thereby "define[d] a statutory right for the petitioner to be competent enough to (1) understand the nature and consequences of the proceedings against him, and (2) assist properly in his defense." *Id.* at 6a.

The court concluded, however, that the district court had improperly disposed of the case. The court explained that rather than dismissing Carter's habeas petition and tolling the statute of limitations prospectively, the district court should have instead "stayed [the proceedings] according to section 4241(d)" for any claims that the district court determined "essentially require [Carter's] assistance," until such time as Carter is found competent. Pet. App. 13a-15a. The court explained that staying the proceedings "would allow all parties to remain actively involved and the court to monitor Carter's

on-going condition." *Id.* at 14a. The court noted that if the district court on remand concluded that Carter's assistance was not "essential" to the "full and fair adjudication" of any of Carter's claims, it should appoint a "next friend" to litigate them. *Id.* at 15a. The court agreed, however, that Carter's assistance was essential to litigation of his ineffective-assistance-of-counsel claims because "Carter alone has evidence of the interactions between him and his trial and appellate attorneys, and that evidence is inaccessible as long as [Carter] remains unable to communicate with his habeas attorneys." *Id.* at 12a.

b. Judge Rogers dissented. Pet. App. 15a-26a. In his view, Carter's asserted right to competence in habeas proceedings "has no basis in the Constitution or federal statutes." *Id.* at 15a-16a. He explained that the federal competency-hearing statute, 18 U.S.C. 4241, "provides for competency hearings for defendants in criminal proceedings, and cannot be read to extend to post-conviction proceedings." Pet. App. 19a. He further explained that *Rees* stands for the proposition that a habeas petitioner must be competent to terminate his postconviction proceedings, but not to assist counsel in those proceedings. *Id.* at 18a. In that respect, he reasoned, the prisoner is a witness in support of his petition, and civil proceedings are not halted when a witness becomes incompetent. *Id.* at 24a-26a. Judge Rogers stated that the majority's decision "allows habeas petitioners to prevent States from enforcing their judgments, potentially forever, on the grounds of a nonexistent right to competency in habeas proceedings." *Id.* at 15a-16a.

SUMMARY OF ARGUMENT

A. This Court has never recognized a constitutional right to counsel during collateral review of a conviction or sentence, but Congress has created a statutory right to counsel for capital prisoners in federal postconviction proceedings. See 18 U.S.C. 3599 (2006 & Supp. II 2008). Section 3599 does not expressly create a right to be competent to assist counsel. The court of appeals' holding in *Gonzales*, No. 10-930, that Section 3599 implicitly guarantees an additional right to competence to assist counsel—and a right for capital prisoners who are unable to meet that standard to stay their postconviction proceedings—does not withstand scrutiny.

In the postconviction setting, a prisoner's competence has never been an inflexible prerequisite to litigating his habeas claims. Courts have long recognized that a "next friend" may sometimes pursue a habeas petition on behalf of a prisoner who is unable to litigate his own case due to mental incapacity. See *Whitmore* v. *Arkansas*, 495 U.S. 149 (1990). The only constitutional right to competency that this Court has recognized for convicted prisoners is an Eighth Amendment prohibition against carrying out a death sentence against an insane person. See *Ford* v. *Wainwright*, 477 U.S. 399 (1986) (plurality opinion). By requiring a stay of postconviction proceedings when a capital prisoner is unable to assist his counsel, the right recognized by the court of appeals in *Gonzales* would frequently supersede the constitutional rule recognized in *Ford*, which requires a stay only when the prisoner is unaware of the punishment he is about to suffer and why he is to suffer it, not when he is unable to assist his lawyers.

The court of appeals' holding in *Gonzales* is not justified by common-law concepts of competency during and

after trial. The right to competency in postconviction proceedings is not provided by the Constitution, and it is not expressly provided by Section 3599. Moreover, no valid due-process concerns justify inferring a right to competency in Section 3599. Although due process demands that a criminal defendant be competent to stand trial, the demands of due process are less stringent after the conclusion of direct review. Congress could, consistent with constitutional principles, choose to provide counsel to indigent capital prisoners seeking postconviction relief without providing those prisoners with an additional right of competence to assist counsel in those proceedings.

B. Neither the federal competency-hearing statute, 18 U.S.C. 4241, nor this Court's decision in *Rees* v. *Peyton*, 384 U.S. 312 (1966), affords a right to competence to assist postconviction counsel as the court of appeals concluded in *Carter*, No. 11-218. By its terms, Section 4241 does not apply to postconviction proceedings. It permits a district court to grant a competency hearing between the commencement of a prosecution and the sentencing, or between the commencement of supervised release and the completion of a sentence. 18 U.S.C. 4241(a). Postconviction proceedings do not occur during those specified periods.

This Court's citation of the competency-hearing statute in *Rees* did not create a right to competency in federal postconviction proceedings. In *Rees*, the Court instructed the district court to determine whether Rees, who had tried to withdraw his petition for certiorari, had the capacity to make a rational choice about whether to abandon his petition. It included a "Cf." citation to the then-current version of the federal competency-hearing statute. 384 U.S. at 314. After the district court found

Rees incompetent, the Court held his petition without further action until he died. *Rees* does not address whether an inmate has a right to be competent to *litigate* his federal habeas petition; it stands only for the proposition that he must be competent to *withdraw* his petition and forgo postconviction relief.

Nor does *Rees* suggest that Section 3599 provides a right to competence in postconviction proceedings. *Rees* substantially predates the 1988 enactment of Section 3599's predecessor, and there is no evidence that Congress considered *Rees* when it enacted Section 3599.

C. Although Section 3599 and *Rees* do not mandate that a district court stay a capital prisoner's postconviction proceedings when he is incompetent to assist counsel, district courts have inherent authority to granted limited competency-related stays in appropriate circumstances. In the postconviction context, the district court would have discretion to grant a stay that was consistent with the purposes of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, which are to reduce delays in the execution of state and federal sentences and to further the principles of comity, finality, and federalism.

When a capital prisoner's claims can be fairly litigated without his assistance, a competency-related stay would be difficult to justify. That will usually be the case in Section 2254 proceedings, where a federal court's review of claims that were exhausted before a state court is limited to the state-court record. See 28 U.S.C. 2254(d)(1); *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1398 (2011). In cases where a capital prisoner's assistance would be crucial to a potentially meritorious claim, AEDPA would not necessarily foreclose a stay for a lim-

ited period to afford the prisoner the opportunity to regain his competence.

D. Indefinite stays of postconviction proceedings were not warranted in either of these cases. In *Gonzales*, the district court concluded that the claims were record-based and could fairly be litigated without Gonzales's assistance. Under those circumstances, the court of appeals had no warrant for ordering a stay.

In *Carter*, the ineffective-assistance-of-counsel claims that the court of appeals identified as warranting a stay are record-based and would not require Carter's assistance. Under those circumstances, no stay, let alone an indefinite one, was appropriate to determine whether Carter might regain competence.

ARGUMENT

A CAPITAL PRISONER'S INCOMPETENCE TO ASSIST HIS COUNSEL DOES NOT PROVIDE GROUNDS FOR AN INDEFINITE STAY OF POSTCONVICTION PROCEEDINGS

A. Section 3599 Does Not Guarantee A Right Of Competence To Assist Postconviction Counsel

1. The Sixth Amendment, as applied to the States through the Fourteenth Amendment, provides that the accused "[i]n all criminal prosecutions * * * shall * * * have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. At trial, that constitutional guarantee entitles indigent felony defendants to appointed counsel in either state or federal court. See *Gideon* v. *Wainwright*, 372 U.S. 335, 341, 344 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458, 463 (1938). Once the right to counsel attaches, it applies at all phases of the trial proceedings "where substantial rights of a criminal accused may be affected." *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967); see *United States* v. *Wade*, 388 U.S. 218,

224-225 (1967). The Court has further held, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, that indigent defendants pursuing their first appeal of right from a criminal conviction have a right to appointed counsel. *Douglas* v. *California*, 372 U.S. 353, 356-357 (1963); see *Halbert* v. *Michigan*, 545 U.S. 605, 610 (2005).

The Court has never recognized a constitutional right to counsel during collateral review of a conviction or sentence. See, *e.g.*, *Martinez* v. *Ryan*, 132 S. Ct. 1309, 1315 (2012); *Lawrence* v. *Florida*, 549 U.S. 327, 336-337 (2007); *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991). Congress, however, "created a statutory right to qualified legal representation for capital defendants in federal habeas corpus proceedings" when it enacted 18 U.S.C. 3599. *McFarland* v. *Scott*, 512 U.S. 849, 851 (1994); see also *Martel* v. *Clair*, 132 S. Ct. 1276, 1283-1285 (2012).[1] Section 3599(a)(2) provides that "[i]n any post conviction proceeding under" 28 U.S.C. 2254 or 2255 "seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the

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[1] Section 3599 was originally enacted as part of the statute creating the federal capital offense of drug-related homicide, and it was originally codified at 21 U.S.C. 848(q)(4)-(10) (1988). Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(b), 102 Stat. 4393-4394. In 2006, Congress determined that the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 *et seq.*, would provide the exclusive framework for imposing a federal death sentence. It repealed the death-penalty procedures in Title 21 and moved the statute providing for appointment of counsel, without substantive change, to 18 U.S.C. 3599. See Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, § 222, 120 Stat. 231-232.

furnishing of such other services in accordance with subsections (b) through (f)." Counsel appointed under the statute must generally meet certain experience requirements, 18 U.S.C. 3599(b)-(d), and will, unless replaced, represent the litigant throughout a variety of judicial and other proceedings, 18 U.S.C. 3599(e). Section 3599 "reflec[ts] a determination that quality legal representation is necessary in all capital proceedings to foster fundamental fairness in the imposition of the death penalty." *Clair*, 132 S. Ct. at 1285 (internal quotation marks and citation omitted).

Section 3599 does not, however, expressly create a right to be competent to assist counsel in federal capital postconviction proceedings. The only mention of "competency" in Section 3599 appears in the list of proceedings in which appointed counsel will represent the habeas applicant, which includes "such competency proceedings * * * as may be available." 18 U.S.C. 3599(e). But Section 3599 does not itself make "available" any new categories of "competency proceedings." And the federal statute governing competency determinations, 18 U.S.C. 4241, does not apply to capital postconviction proceedings. See p. 23, *infra*.

2. a. The court of appeals in *Gonzales*, No. 10-930, concluded that Section 3599 implicitly guarantees an additional right of competence to assist counsel and, in turn, a right for capital prisoners unable to meet that competency standard to stay their federal postconviction proceedings. That holding does not withstand scrutiny.

Even at trial, the right to counsel (which is guaranteed by the Sixth Amendment) and the right to competency (which is guaranteed as part of a criminal-trial defendant's general due-process and fair-trial rights) are separate. Compare, *e.g.*, *Turner* v. *Rogers*, 131 S.

Ct. 2507, 2516 (2011) (characterizing right to appointed counsel for indigent defendant in a criminal trial as a Sixth Amendment right), with *Drope* v. *Missouri*, 420 U.S. 162, 172 (1975) (characterizing competency at criminal trial as a due-process right). In the postconviction setting in particular, a prisoner's competency to consult personally with an attorney has never been an inflexible prerequisite to litigating his habeas claims. To the contrary, courts have long recognized that a "next friend" may sometimes pursue a habeas petition on behalf of a prisoner who "is unable to litigate his own cause due to mental incapacity." *Whitmore* v. *Arkansas*, 495 U.S. 149, 165 (1990); see 28 U.S.C. 2242 ("Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.").[2]

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[2] Rule 2(c)(5) of the Rules Governing Section 2254 Cases in the United States District Courts was specifically amended to permit a motion for postconviction relief to be signed "by the petitioner or by a person authorized to sign it for the petitioner under 28 U.S.C. [Section] 2242." See also Rules Governing Section 2255 Proceedings for the United States District Courts R. 2(b)(5). The advisory committee amending those rules referred to *Whitmore* and clarified that it expected courts to "apply third-party, or 'next-friend,' standing analysis in deciding whether the signer was actually authorized to sign the petition on behalf of the petitioner." Rules Governing Section 2254 Cases R. 2 advisory committee's note (2004); accord Rules Governing Section 2255 Proceedings R. 2 advisory committee's note (2004).

Furthermore, Federal Rule of Civil Procedure 17(c), which applies to federal postconviction proceedings, see Rules Governing Section 2254 Cases R. 12 (Supp. III 2009); Rules Governing Section 2255 Proceedings R. 12, broadly provides for the appointment of a "next friend" to pursue federal claims on behalf on an incompetent person. See Fed. R. Civ. P. 17(c) ("A minor or an incompetent person who does not have a duly adopted representative may sue by a next friend or by a guardian ad litem.").

The only constitutional right to competency that this Court has recognized for convicted prisoners is an Eighth Amendment prohibition against "carrying out a sentence of death upon a prisoner who is insane." *Panetti* v. *Quarterman*, 551 U.S. 930, 934 (2007) (quoting *Ford* v. *Wainwright*, 477 U.S. 399, 409-410 (1986) (plurality opinion)). The prohibition against executing an insane prisoner, however, does not imply a right of competence to assist counsel in the litigation of a collateral attack on the original conviction and sentence. First of all, a claim of incompetence to be executed generally does not become ripe "until *after* the time has run to file a first federal habeas petition." *Id.* at 943 (emphasis added). Furthermore, a prisoner may be competent to be executed even if he is not competent to communicate with counsel. Justice Powell's controlling opinion in *Ford* explained that the standard for competency to be executed requires only that the prisoner be aware "of the punishment [he is] about to suffer and why [he is] to suffer it," not that he be "able to assist in his own defense." 477 U.S. at 422 & n.3 (Powell, J., concurring in part and concurring in the judgment); see *Panetti*, 551 U.S. at 949 (stating that Justice Powell's concurrence in *Ford* is the controlling opinion).

Had Congress intended for Section 3599 to create not only a new right to counsel, but also a new right of competency in the postconviction context, it would have said so expressly. Not only the Constitution, but also the laws of a number of States, permit execution of an otherwise competent prisoner even if he is not "able to assist in his own defense." *Ford*, 477 U.S. at 422 n.3 (Powell, J., concurring in part and concurring in the judgment) (noting that the "prevailing test" in the States did not require competence to assist counsel as a prerequisite to

carrying out a death sentence). The right recognized by the court of appeals in *Gonzales*, however, would as a practical matter frequently supersede those constitutional and state-law rules. If a district court is required to stay a capital prisoner's first habeas petition when he cannot assist counsel, the court will also have to stay the prisoner's execution. See *Lonchar* v. *Thomas*, 517 U.S. 314, 320 (1996) ("If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot."). Congress gave no express indication that, by guaranteeing a right to postconviction counsel, it intended to occupy the field in the area of competency as well.

b. The court of appeals in *Gonzales* provided no specific evidence, textual or otherwise, that Congress implicitly intended to take such a transformative step by enacting Section 3599. In the previous Ninth Circuit case on which the court of appeals' decision was based, the court focused extensively on common-law concepts of competency during and after trial. See *Rohan* v. *Woodford*, 334 F.3d 803, 807-812, cert. denied, 540 U.S. 1069 (2003); see also *Gonzales* Br. in Opp. 21-23. But whatever the common law on that issue may have been, it does not illuminate the meaning of a statute that establishes only a right to counsel. As the court in *Rohan* acknowledged, "the right to competence has met with a mixed constitutional reception," as this Court has recognized a defendant's right of competence to assist in his defense at trial but has not required a similar degree of competency before a lawfully convicted prisoner may be executed. 334 F.3d at 808-809. Nothing in Section 3599 gives a postconviction right of competence a more favor-

able reception—or even suggests that Congress intended to create a statutory right of competence at all.

c. The court in *Rohan* also suggested that principles of constitutional avoidance support the inference of a right to competency in Section 3599. 334 F.3d at 813-814. In its view, a "substantial constitutional question[]" exists whether due process requires a right of competency as a necessary adjunct any time a statute grants a right to counsel. *Id.* at 813. No valid due-process concerns, however, would justify inferring a right to competency in Section 3599.

A criminal trial is "the paramount event for determining the guilt or innocence of the defendant." *Herrera* v. *Collins*, 506 U.S. 390, 416 (1993). Due process demands that a criminal defendant be competent to stand trial, see *Drope*, *supra*, because a defendant who cannot understand the nature of the proceedings against him or assist counsel in preparing his defense will be unable to exercise other rights "deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." See *Cooper* v. *Oklahoma*, 517 U.S. 348, 354 (1996) (internal quotation marks and citation omitted).

Once the direct appeal concludes, however, "a presumption of finality and legality attaches to the conviction and sentence." *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983). At that point, the demands of due process become less stringent. For example, in *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987), a prisoner argued that he had been denied due process when postconviction counsel, appointed pursuant to state law, had withdrawn on appeal without following the procedures described in

Anders v. *California*, 386 U.S. 738 (1967). See *Finley*, 481 U.S. at 557-558. This Court rejected that argument, concluding that "the State has made a valid choice to give prisoners the assistance of [postconviction] counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position—at trial and on first appeal as of right." *Id.* at 559. In the postconviction context, "the Constitution does not put the State to the difficult choice between affording no counsel whatsoever or following the strict procedural guidelines annunciated in *Anders*." *Ibid.*

The government "has more flexibility in deciding what procedures are needed in the context of postconviction relief." *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 69 (2009). Due process requires only that the habeas petitioner have "an adequate opportunity to present his claims fairly." *United States* v. *MacCollom*, 426 U.S. 317, 327-328 (1976); see also *Finley*, 481 U.S. at 556 (holding that postconviction proceedings are constitutional if they "comport[] with fundamental fairness"). Consistent with those principles, Congress could make a "valid choice" to provide counsel to indigent capital prisoners seeking postconviction relief without providing an additional right to competency to assist that counsel.

B. *Rees* v. *Peyton* Does Not Afford A Right Of Competence To Assist Postconviction Counsel

Unlike the Ninth Circuit in *Gonzales*, the Sixth Circuit in *Carter*, No. 11-218, did not rely on Section 3599 to require a competency-based stay of federal postconviction proceedings. Instead, the court concluded that this Court had already recognized a statutory "right to com-

petence" in federal postconviction proceedings grounded in the federal competency-hearing statute, 18 U.S.C. 4241. See Pet. App. 4a (citing *Rees* v. *Peyton*, 384 U.S. 312 (1966)). That is incorrect. Section 4241 does not apply to federal postconviction proceedings, and *Rees* did not hold otherwise.

1. By its terms, the federal competency-hearing statute does not apply to postconviction proceedings. The statute is entitled "Determination of mental competency to stand trial [or] to undergo postrelease proceedings." 18 U.S.C. 4241. It permits a district court to grant a competency hearing, either *sua sponte* or at the request of either party, "[a]t any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence." 18 U.S.C. 4241(a). Capital postconviction proceedings occur neither "prior to the sentencing of the defendant" nor "after the commencement of probation or supervised release."

Furthermore, the statute provides that a hearing should be conducted if there is reasonable cause to believe that "the defendant" is suffering from a mental disease or defect that renders him "unable to understand the nature and consequences of the proceedings against him" or "to assist properly in his defense." 18 U.S.C. 4241(a). In postconviction proceedings, the prisoner is not "the defendant" in "proceedings [brought] against him." Rather, the prisoner initiates postconviction proceedings and requires the government to defend its conviction, which is presumed to be valid. See *Barefoot*, 463 U.S. at 887.

2. The court of appeals in *Carter* did not even attempt to address the plainly inapplicable text of Section 4241. It relied instead on this Court's decision in *Rees*, *supra*, stating that the Court in *Rees* had "appl[ied] section 4241 to habeas actions" and had thereby "define[d] a statutory right for the petitioner to be competent enough to (1) understand the nature and consequences of the proceedings against him, and (2) assist properly in his defense." Pet. App. 6a. The court's reliance on *Rees* is misconceived.

In that case, Melvin Rees, a state capital prisoner, filed a habeas petition in federal district court challenging his murder conviction. *Rees*, 384 U.S. at 312-313. The district court denied relief; the court of appeals affirmed; and Rees's counsel, with Rees's consent, filed a petition for a writ of certiorari. *Id.* at 313. Roughly a month later, however, "Rees directed his counsel to withdraw the petition and forgo any further legal proceedings." *Ibid.* Counsel advised the Court that "he could not conscientiously accede to these instructions" because he feared that Rees was incompetent. *Ibid.* This Court, "in aid of the proper exercise of [its] certiorari jurisdiction," ordered the district court to determine whether Rees had the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id.* at 313-314. The Court included a "Cf." citation to 18 U.S.C. 4244-4245 (1964), the predecessor to Section 4241. See *Rees*, 384 U.S. at 314.

Following the Court's instructions, the district court determined that Rees was incompetent. *Rohan*, 334 F.3d at 815 (citing district court docket). This Court,

apparently over the State's objection, then ordered that the case be "held without action on the petition for certiorari until further order." *Rees* v. *Peyton*, 386 U.S. 989 (1967). The petition remained held until 1995, when the Court dismissed it, apparently because Rees had passed away. *Rees* v. *Superintendent of Va. State Penitentiary*, 516 U.S. 802; see *Rohan*, 334 F.3d at 815 n.8.

The Court's "Cf." citation cannot fairly be read to have "appl[ied] section 4241 to habeas actions" as the court of appeals concluded it did. Pet. App. 6a. That citation is more logically read as this Court suggesting that the district court, in carrying out the instruction to hold a competency hearing, might follow procedures similar to the federal statutory procedures for determining trial competence.

In any event, *Rees* does not address the situation presented by these cases. *Rees* did not concern competency to *litigate* a federal habeas petition, but instead competency "to *withdraw* a certiorari petition." *Godinez* v. *Moran*, 509 U.S. 389, 398 n.9 (1993) (emphasis added). The Court's disposition of *Rees* therefore should not be taken to suggest that a prisoner has a right to stay his habeas proceedings indefinitely on the ground that he is not able to assist in the litigation. To the contrary, the Court has since suggested that if a habeas applicant meets the incompetency standard set forth in *Rees*, the case might be litigated without his participation by a "next friend." See *Whitmore*, 495 U.S. at 166 (using *Rees* to define the standard for determining when a prisoner's mental incapacity might permit "next friend" habeas litigation).

3. Nor does *Rees* support the Ninth Circuit's interpretation of Section 3599 as providing a right to competence to assist counsel in postconviction proceedings.

See *Rohan*, 334 F.3d at 815 (stating that *Rees* "supports [the] conclusion" that Section 3599 provides a right to competence in postconviction proceedings). *Rees* substantially predates the 1988 enactment of Section 3599's predecessor, and the Ninth Circuit in *Rohan* identified no evidence that Congress had *Rees* in mind when it passed Section 3599.

C. District Courts Have Inherent Authority To Grant Limited Competency-Related Stays In Certain Cases

1. Although neither Section 3599 nor *Rees* mandates that a district court stay a capital prisoner's habeas proceedings when he is incompetent to assist counsel, those authorities do not preclude the possibility of such a stay. Even in the habeas context, "[d]istrict courts do ordinarily have authority to issue stays, where such a stay would be a proper exercise of discretion." *Rhines* v. *Weber*, 544 U.S. 269, 276 (2005) (citations omitted).

Of course, a district court's discretion to grant a stay is "circumscribe[d]" by AEDPA. *Rhines*, 544 U.S. at 276. Stays of habeas petitions filed under AEDPA must "be compatible with AEDPA's purposes," which are "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases," *ibid.* (citation and internal quotation marks omitted), and "to further the principles of comity, finality, and federalism," *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) (citation omitted); see also *Rhines*, 544 U.S. at 277 ("Even where stay and abeyance is appropriate, the district court's discretion in structuring the stay is limited by the timeliness concerns reflected in AEDPA."). This Court repeatedly has emphasized "the State's interest in the finality of convictions that have survived direct review within the state court system," which "'preserve[s] the

federal balance'" by respecting the States' "'good-faith attempts to honor constitutional rights'" as well as their "'sovereign power to punish offenders.'" *Calderon* v. *Thompson*, 523 U.S. 538, 555-556 (1998) (quoting *Murray* v. *Carrier*, 477 U.S. 478, 487 (1986)).

A competency-related stay of a habeas petition that could fairly be litigated without the capital prisoner's assistance could not be squared with those purposes. Nor could an indefinite stay issued solely in the hope that the prisoner might some day regain competence. Cf. *Rhines*, 544 U.S. at 277 (declining to endorse stay procedure in which a case could be "stayed indefinitely"). Such stays would delay—perhaps permanently—resolution of the proceedings and destroy the notion of finality implicit in state court judgments. Those concerns have particular force in capital postconviction proceedings, where the incentive for habeas petitioners to pursue speedy postconviction relief is largely absent. See *id.* at 277-278 (noting that "not all petitioners have an incentive to obtain federal relief as quickly as possible" and that capital prisoners in particular have an interest in "prolong[ing] their incarceration and avoid[ing] execution of the sentence of death"). Such stays would also defeat the purpose of postconviction relief. A prisoner may legitimately commence postconviction proceedings because he has one or more claims that he believes may entitle him to relief from his conviction or sentence. Staying the proceedings of an incompetent prisoner with a meritorious claim, rather than allowing the proceedings to be litigated by a "next friend" with the prisoner's best interests in mind, does nothing to "assure that the habeas petitioner is not being held in violation of his or her federal constitutional rights." *Herrera*, 506 U.S. at 402.

2. a. When a capital prisoner's claims can be fairly litigated without his assistance, a competency-related stay would not be warranted. The prisoner's assistance is not needed to select and advance the arguments having the greatest possibility of success. This Court has "recognized the superior ability of trained counsel in the examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983) (citation and internal quotation marks omitted; brackets in original) (holding that on direct appeal, appointed counsel may select the points to be raised and need not raise "nonfrivolous points requested by the client"); see also *Gonzalez* v. *United States*, 553 U.S. 242, 249-250 (2008) ("In most instances the attorney will have a better understanding of the procedural choices than the client; or at least the law should so assume.").

In Section 2254 proceedings, a state capital prisoner's assistance to counsel will usually be unnecessary for resolution of his claims. A state prisoner must generally exhaust the remedies available for his claims in state court. 28 U.S.C. 2254(b)(1)(A). And to be entitled to federal habeas relief on a claim that was adjudicated on the merits in state court, a prisoner must establish that the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. 2254(d)(1). In *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011), this Court made clear that the district court's review of such a claim "is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 1398; see *id.* at 1400 ("[E]vidence introduced in federal court has no bearing on [Section] 2254(d)(1) review."). A state prisoner's ability to

provide testimony or direct his counsel to other non-record evidence in support of his exhausted habeas claims is therefore largely irrelevant.

b. In some scenarios, a capital prisoner's testimony or assistance might be crucial to a potentially meritorious habeas claim. For example, a state prisoner may be entitled to a federal evidentiary hearing if he meets the stringent requirements of 28 U.S.C. 2254(e)(2) for a claim that was not adjudicated on the merits in state court. See *Pinholster*, 131 S. Ct. at 1400-1401.[3] Moreover, for a federal capital prisoner, Section 2255 proceedings may be the first opportunity to present evidence of certain collateral claims, for example, ineffective assistance of counsel. See *Massaro* v. *United States*, 538 U.S. 500 (2003). In such circumstances, AEDPA would not necessarily foreclose a stay for a limited period to afford the prisoner the opportunity to regain his competence (on his own or with medication). Cf. *Rhines*, 544 U.S. at 277 (permitting habeas stays to al-

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[3] 28 U.S.C. 2254(e)(2) provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

low for state court review of unexhausted claims on showing of "good cause," but noting that a stay would amount to an abuse of discretion if the unexhausted claims "are plainly meritless"); *Nelson* v. *Campbell*, 541 U.S. 637, 649 (2004) ("Before granting a stay, a district court must consider * * * the likelihood of success on the merits."). The district court would have discretion to strike an appropriate balance between the capital prisoner's interest in pursuing his habeas claims and the State's (and AEDPA's) "strong interest in proceeding with its judgment." *Gomez* v. *United States Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam).

Although a limited stay may be appropriate in those circumstances, an indefinite stay would not be. Counsel will usually have means other than the prisoner's knowledge to establish facts outside the record that bear on a potentially meritorious claim. Other witnesses, including the trial and appellate lawyers, could be called to testify, and those witnesses may also have notes and documentary evidence related to the claim. In that respect, the prisoner's testimony is no different than that of a third-party witness, and the unavailability of a third-party witness to testify in support of a habeas petitioner's claims plainly would not warrant an indefinite stay of the postconviction proceedings. Moreover, a district court in capital postconviction proceedings would have the discretion to permit an incompetent prisoner unable to offer testimony on his own behalf to introduce the necessary facts by otherwise inadmissible hearsay. See Fed. R. Evid. 807; cf. *Sears* v. *Upton*, 130 S. Ct. 3259, 3263 n.6 (2010) (per curiam) ("[W]e have * * * recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay

rule.") (citing *Green* v. *Georgia*, 442 U.S. 95, 97 (1979) (per curiam)). If it appears that the prisoner will not regain competence during a limited stay, the proper course is for the district court to allow the prisoner's claims to be litigated by a "next friend," not to prevent the State from carrying out its judgment by staying the postconviction proceedings indefinitely.

D. Indefinite Stays Were Not Warranted In Respondents' Cases

1. Under the principles set forth above, the Ninth Circuit's decision in *Gonzales*, No. 10-930, must be reversed. The district court declined to stay Gonzales's habeas proceedings because it concluded that his claims were purely record-based and could be fairly litigated by counsel without his personal involvement. Pet. App. C14, C16, C27-28. The court of appeals reversed, based on its view that Gonzales was entitled to a stay if he were incompetent to litigate his judicial-bias claim, which it believed "could potentially benefit" from Gonzales's involvement despite being limited to the written record. *Id.* at A5-A6; see 28 U.S.C. 2254(d)(1).

The court of appeals erred in concluding that Gonzales had such a right. The court of appeals did not disturb the district court's finding that Gonzales's habeas claims were fully developed and could be litigated even if he were not competent to assist counsel. See Pet. App. C7-C27. Under those circumstances, the court of appeals had no warrant for ordering a stay. Even assuming the district court could, consistent with AEDPA, grant a limited stay, declining to do so would not constitute an abuse of its equitable discretion.

2. The Sixth Circuit's decision in *Carter*, No. 11-218, also must be reversed. The court of appeals correctly

concluded that the district court should have appointed a "next friend" to litigate any claims for which Carter's assistance was not essential for a full and fair adjudication. Pet. App. 15a. The court incorrectly concluded, however, that Carter's ineffective-assistance-of-counsel claims must be stayed until Carter regains competence.

The state court considered and rejected Carter's ineffective-assistance-of-counsel claims in state post-conviction proceedings, *Carter II*, 2000 Ohio App. LEXIS 5935, at *10-*13, and the district court's consideration of those claims would therefore be limited to the state court record, see *Pinholster*, 131 S. Ct. at 1398. Furthermore, even if an evidentiary hearing on those claims were somehow warranted, it is not the case that "Carter alone has evidence of the interactions between him and his trial and appellate attorneys." Pet. App. 12a. Carter's attorneys could provide testimony or other assistance pertaining to their interactions with him, and the state court specifically concluded that Carter's competency claim was well-developed in the record, that he had identified nothing outside the record to indicate that counsel had inadequately pursued the competency claim, and that his claim of ineffective-assistance-of counsel during the penalty phase was unsupported. *Carter II*, 2000 Ohio App. LEXIS 5935, at *10-*13. Under those circumstances, no stay, let alone an indefinite one, was appropriate to determine whether Carter might regain competence.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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JUNE 2012

APPENDIX

1. 18 U.S.C. 3599 (2006 & Supp. II 2008):

Counsel for financially unable defendants

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had

not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize

the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection[1] at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the[2] paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305[3] of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as neces-

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[1] So in original. Probably should be "section".

[2] So in original. Probably should be "this".

[3] So in original. Probably should be "5303".

sary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(3) The amounts paid under this paragraph[4] for services in any case shall be disclosed to the public, after the disposition of the petition.

2. 18 U.S.C. 4241:

Determination of mental competency to stand trial to undergo postrelease proceedings[3]

(a) MOTION TO DETERMINE COMPETENCY OF DEFENDANT.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

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[4] So in original. Probably should be "subsection".

[3] So in original. Probably should be "stand trial or to undergo postrelease proceedings".

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.

(e) DISCHARGE.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227.

(f) ADMISSIBILITY OF FINDING OF COMPETENCY.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in

raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

AMICUS CURIAE BRIEF

Nos. 10-930 and 11-218 [CAPITAL CASES]

In the Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

ERNEST VALENCIA GONZALES,
Respondent.

TERRY TIBBALS, WARDEN,
Petitioner,

v.

SEAN CARTER,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Gonzales v. Ryan (No. 10-930):

> Whether 18 U.S.C. § 3599(a)(2), which provides that an indigent capital inmate pursuing federal post-conviction relief "shall be entitled to the appointment of one or more attorneys," entitles such a prisoner to a stay of his federal post-conviction proceedings if he is not competent to assist his counsel.

Tibbals v. Carter (No. 11-218):

1. Do capital prisoners possess a "right to competence" in federal habeas proceedings under *Rees* v. *Peyton,* 384 U.S. 312 (1966)?

2. Can a federal district court order an indefinite stay of a federal habeas proceeding under *Rees*?

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INTEREST OF *AMICUS CURIAE*

The American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of the Respondents.[1] The ABA requests that the Court hold that the statutory right to an attorney under 18 U.S.C. § 3599 includes an effective attorney-client relationship, which requires that a federal defendant or habeas petitioner be sufficiently competent to assist counsel in prosecuting his claims and, if he is not, that he be entitled to an appropriate stay.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members practice in all 50 States, the District of Columbia, and the U.S. Territories, and include attorneys in private firms, corporations, non-profit organizations, and government agencies. They also include judges, prosecutors, defense attorneys and public defenders, as well as legislators, law professors, law students, and non-lawyer "associates" in related fields.[2]

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of the positions in it.

For over a century, the ABA has been committed to advocating for the ethical and effective representation of all clients, including criminal defendants. In 1908, the ABA adopted the Canons of Professional Ethics as a model for the regulation of attorneys by their state and jurisdictional highest courts. Amended over time, the Canons are now published as the ABA Model Rules of Professional Conduct ("Model Rules").[3] The Model Rules have been adopted in all but a handful of jurisdictions. Arizona, pertinent to Mr. Gonzales' case, adopted the 1983 Model Rules with some amendments in February 1985, and the 2002 amendments in 2003. Ohio, pertinent to Mr. Carter's case, used a version of the 1969 ABA Model Code of Professional Responsibility until adopting its version of the Model Rules in August 2006 (effective Feb. 2007).

In 1908, the ABA established the entity now known as the ABA Standing Committee on Ethics and Professional Responsibility, which publishes formal ethics opinions on professional and judicial conduct, provides informal responses to ethics inquiries, and upon request assists professional organizations and

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[3] The Model Rules, like the Canons and the intervening Model Code of Professional Responsibility, are developed by task forces composed of members of the ABA and national, state, and local bar organizations; they are then reviewed by academicians, practicing lawyers, and the judiciary. They become ABA policy only after vote of the ABA House of Delegates ("HOD"), which is composed of more than 550 representatives from States and Territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. Information on the HOD is available at http://www.americanbar.org/groups/leadership/house_of_delegates.html (last visited July 26, 2012).

courts in their development, modification, and interpretation of the Model Rules and other ethical standards.[4] Pertinent to the issues now before the Court is *ABA Formal Ethics Opinion 96-404, Client Under a Disability, reprinted in* ABA/BNA Lawyers' Manual on Professional Conduct 109, 110 (ABA 2006) (hereinafter, "Ethics Op."), which is discussed in the Argument, below.

In 1920, the ABA Criminal Justice Section was formed to advocate for improvements in the criminal justice system and in 1964, it began work on the ABA Standards for Criminal Justice ("ABA Standards"). The first edition was published in 1973. Amended over time, the ABA Standards are a collection of "best practices" based on the consensus views of a broad array of criminal justice professionals.[5]

In 1989, the ABA Death Penalty Representation Project presented its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which were adopted as ABA policy. These Guidelines were subsequently revised and adopted by the ABA in 2003 and have now been widely adopted by state and local bar associations and indigent defense organizations, and by court rule in many death penalty

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[4] For the Model Rules of Professional Conduct and information on this Standing Committee, *see* http://www.americanbar.org/groups/professional_responsibility.html (last visited July 26, 2012).

[5] For the Standards for Criminal Justice and information on the Criminal Justice Section, *see* http://www.americanbar.org/criminal justice/policy/standards.html (last visited July 26, 2012).

jurisdictions.[6] For more than 25 years, this ABA Project has also provided training and resources to defense counsel and judges, and has recruited hundreds of ABA members to represent *pro bono* death-sentenced prisoners who lack legal counsel. In addition, in 2001, the ABA Death Penalty Moratorium Implementation Project was formed to work with jurisdictions in undertaking comprehensive examinations of their capital punishment laws and processes.[7]

Finally, in 2003, following this Court's ruling in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the ABA Task Force on Mental Disability and the Death Penalty was formed by the ABA Section of Individual Rights and Responsibilities to consider the extent to which impaired mental conditions other than mental retardation should be exempted from the death penalty.[8] Its conclusions as to prisoners who are

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[6] For the Guidelines and information on the Death Penalty Representation Project, *see* http://www.americanbar.org/advocacy/other_aba_inititives/death_penalty_representation.html (last visited July 26, 2012).

[7] For information on the Death Penalty Moratorium Implementation Project, *see* http://www.americanbar.org/groups/individual_rights/projects/death_penalty_moratorium_implementation_project.html (last visited July 26, 2012). Since 2003, the Moratorium Implementation Project has completed studies of eight death penalty jurisdictions and is studying six additional jurisdictions.

[8] ABA, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, Mental and Physical Disability L. Rep., Sept.-Oct. 2006, at 668 (hereinafter, "*Report on the Death Penalty and Persons with Mental Disabilities*"). The Task Force

unable to assist counsel in post-conviction proceedings were adopted as ABA policy in 2006[9] and are discussed in the Argument below.

Throughout the ABA's century-long commitment to the development of model codes, standards, and guidelines, the ABA's focus has been ensuring that all clients, including capital habeas petitioners, receive quality legal representation. Having concluded that meaningful communication between a client and his lawyer is essential to an effective attorney-client relationship, the ABA respectfully urges this Court to hold that the statutory right to an attorney under 18 U.S.C. § 3599 must include knowing, rational communication and decision-making by the prisoner and an appropriate stay when the prisoner is not competent to participate.

SUMMARY OF ARGUMENT

For the right to appointment of counsel under § 3599 to be meaningful, the appointment must result in an attorney-client relationship that includes both the right to knowing, rational communication and decision-making by the capital habeas petitioners and,

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was composed of 24 lawyers and mental health professionals, both practitioners and academics, and included members of the American Psychiatric Association and the American Psychological Association. Its conclusions were submitted to the ABA House of Delegates as Recommendation with Report #122A and adopted as ABA policy in August 2006. With minor changes, the Recommendation with Report was officially endorsed by the other two groups. *Id.* at 668-69.

[9] *Id.*

in appropriate circumstances, the right to an appropriate stay of proceedings when they are not competent to participate. Further, the lawyers appointed under § 3599 must retain their ability to comply with their licensing jurisdictions' formulations of the Model Rules. The Model Rules require that the lawyers maintain, as far as reasonably possible, normal lawyer-client relationships, and that they initiate appropriate protective actions, which may include moving for a stay of proceedings when they reasonably believe their clients cannot adequately act in the clients' own interests.

Under the Model Rules, effective communication between the client and lawyer is presumed. When the normal relationship is impaired, the lawyer should continue as far as reasonably possible to take actions consistent with the client's directions and decisions. Because the attorney-client relationship is one of agent and principal, however, a lawyer has no choice but to withdraw if the client's impairment is such that the lawyer is unable to comply with his or her responsibilities under the Model Rules. However, if withdrawal cannot be accomplished without material adverse effect on the client, the Model Rules provide for the lawyer to continue the representation and seek appropriate protective action on behalf of the client.

While the Model Rules permit a lawyer to seek and federal habeas law provides for appointment of a guardian in appropriate circumstances, appointment of a guardian is a serious deprivation of the client's rights and should not be undertaken by the lawyer if other, less drastic, solutions are available. Consistent with the Model Rules, accordingly, the ABA asserts that a lawyer appointed under § 3599 must be able to

pursue "other protective action," including moving for a stay of proceedings in appropriate circumstances.

Clearly, an attorney's showing that a capital habeas petitioner's incompetence will prevent a fair and accurate resolution of specific claims should be sufficient grounds for a stay. However, the showing required should be flexible, and based on the wide variety of difficulties that arise from a prisoner's impairments and the circumstances of the case. Accordingly, the ABA requests that this Court hold that § 3599 also requires that courts use a flexible standard based on the particular incompetency of a petitioner and the circumstances of the case in determining whether a stay is appropriate.

ARGUMENT

I. FOR SECTION 3599'S RIGHT TO AN ATTORNEY TO BE MEANINGFUL, THE ATTORNEY-CLIENT RELATIONSHIP MUST INCLUDE BOTH KNOWING, RATIONAL COMMUNICATION AND DECISION-MAKING BY THE CAPITAL HABEAS PETITIONERS AND AN APPROPRIATE STAY WHEN THEY ARE NOT COMPETENT TO PARTICIPATE.

This Court, in its unanimous opinion last term in *Martel* v. *Clair*, stated that when Congress passed the legislation now known as 18 U.S.C. § 3599, which governs the appointment of counsel in capital cases, it did so in light of "'the seriousness of the possible penalty and . . . the unique and complex nature of the

litigation.'" 132 S. Ct. 1276, 1284-85 (2012) (quoting 18 U.S.C. § 3599(d) (2006)).[10]

The ABA respectfully asserts that for the right to appointment of counsel to be meaningful, the appointment must result in an attorney-client relationship in which there is a right to knowing, rational communication and decision-making by the capital habeas petitioners and, in appropriate circumstances, a right to a stay of proceedings when they are not competent to participate. Further, the lawyers appointed under § 3599 must retain their ability to comply with their licensing jurisdictions' formulations of the Model Rules. This requires that the lawyers maintain, as far as reasonably possible, normal lawyer-client relationships, and when the lawyers reasonably believe that their clients cannot adequately act in the clients' own interests, that they initiate protective actions that, in appropriate circumstances, may include a request for a stay of proceedings.

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[10] The ABA notes that, in *Tibbals* v. *Carter*, Respondent Mr. Carter's brief addresses § 3599 in the alternative. While the ABA, in this brief, addresses only § 3599 as it applies to the duties of lawyers under the Model Rules, the ABA agrees with Respondent Carter that the courts have inherent equitable power to impose stays as a matter of discretion.

A. Effective Legal Representation Requires That Lawyers Comply With The Licensing States' Formulations Of Model Rule 1.14 When Representing Clients Who Are Not Competent

As the Court stated in *Martel*, § 3599 "seeks to promote effective representation for persons threatened with capital punishment" and "aims in multiple ways to improve the quality of representation afforded to capital petitioners and defendants alike." 132 S. Ct. at 1285. It sets requirements, *inter alia,* for counsel's level of legal experience and rates of compensation, "in part to attract better counsel." *Id.* These measures "'reflec[t] a determination that quality legal representation is necessary' in all capital proceedings to foster 'fundamental fairness in the imposition of the death penalty.'" *Id.* (quoting *McFarland* v. *Scott*, 512 U.S. 849, 855, 859 (1994)).[11] In order for there to be "effective" and "quality" representation when a client is not competent, lawyers must comply—at a minimum—with their licensing jurisdictions' formulations of Model Rule 1.14(a) and (b).[12]

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[11] *See also McFarland,* 512 U.S. at 859 ("By providing indigent capital defendants with a mandatory right to qualified legal counsel in these proceedings, Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty.").

[12] Arizona Rule of Professional Conduct 1.14, pertinent to Mr. Gonzales petition, and Ohio Rule of Professional Conduct 1.14, pertinent to Mr. Carter's petition, mirror Model Rule1.14.

Model Rule 1.14(a) provides:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

A "normal client-lawyer relationship presumes that there can be effective communication between the client and lawyer." Ethics Op. at 110 (citing Model Rule 1.4(a)).[13] The relationship also presumes "that the

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[13] Model Rule 1.4(a) states that a lawyer shall:

> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Model Rule 1.4(a) is consistent with the common law tradition,

client, after consultation with the lawyer, can make considered decisions about the objectives of the representation and the means of achieving those objectives." Ethics Op. at 110 (citing Model Rule 1.2(a)).[14]

When a normal attorney-client relationship is impaired, the lawyer should "continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to take action consistent with the client's directions and decisions." *Id.* (citing Comment 1 to Model Rule 1.14(a)). However, in these circumstances, Model Rule 1.14(b) provides:

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which some federal appellate courts have relied on in concluding that there is a right to competence in habeas proceedings under § 3599. *E.g.*, *Rohan ex rel. Gates* v. *Woodford*, 334 F.3d 803, 807-08 (9th Cir.) (discussing competence in phases of proceedings; concluding that, at common law, competence was tied to "capacity for rational communication"), *cert. denied*, 540 U.S. 1069 (2003); *Holmes* v. *Buss*, 506 F.3d 576, 578 (7th Cir. 2007) (citing *Rohan*); *cf. Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981) (noting that attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client") (citation omitted).

[14] Model Rule 1.2(a) states: "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued." *See also, ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. Feb. 2003), *reprinted in* 31 Hofstra L. Rev. 913, 1009 (2003) ("Overcoming barriers to communication and establishing a rapport with the client are critical to effective representation.").

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

In the absence of Model Rule 14(b), where the client's impairment is such that the lawyer is unable to comply with her responsibilities to the client under the Model Rules, the lawyer would have no choice but to withdraw. Ethics Op. at 112 (citing Model Rule 1.16(a)(1)) (withdrawal required where "representation will result in violation of the rules of professional conduct"). In fact, "[b]ecause the relationship of client and lawyer is one of principal and agent, principles of agency law might operate to suspend or terminate the lawyer's authority to act when a client is incompetent." *Id.* at 110.

In considering whether to proceed under Model Rule 14(b) or Model Rule 1.16(a)(1), the lawyer must carefully consider the ramifications to the client:

> The particular circumstances may also be such that the lawyer cannot withdraw without prejudice to the client. For instance, the client's incompetence may develop in the middle of a pending matter and substitute counsel may not be able to represent the client effectively due to

> the inability to discuss the matter with the client.

Ethics Op. at 112; *see also* Model Rule 1.16(b) (stating that a lawyer may withdraw if "(1) withdrawal can be accomplished without material adverse effect on the interests of the client").

Without concluding that a lawyer can never withdraw based on the incompetency of a client, the authors of the Ethics Opinion believed that "the better course of action, and the one most likely to be consistent with Rule 1.16(b), will often be for the lawyer to stay with the representation and seek appropriate protective action on behalf of the client." Ethics Op. at 112 (citing Model Rule 14(b)). That is, the Model Rules permit a narrow exception to the normal responsibilities of a lawyer to the client by "permitting the lawyer to take action [under Model Rule 14(b)] that by its very nature must be regarded as 'adverse' to the client." *Id.* at 113-14.

Further, although Model Rule 14(b) permits a lawyer to seek the appointment of a guardian in appropriate circumstances, and while the federal habeas statute anticipates that a petition may be filed by someone acting on the petitioner's behalf in some circumstances, *see* 28 U.S.C. § 2242, "[t]he appointment of a guardian is a serious deprivation of the client's rights and ought not be undertaken if other, less drastic, solutions are available." Ethics Op. at 112. Before taking this step, the lawyer must make "the requisite determination on his own that a guardianship is necessary and is the least restrictive alternative." *Id.* at 114. Similarly,

> Although not expressly dictated by the Model Rules, the principle of respecting the client's autonomy dictates that the action taken by a lawyer who believes the client can no longer adequately act in his or her own interest should be the action that is reasonably viewed as the least restrictive action under the circumstances.

Id. at 112.

Accordingly, the ABA asserts that when a lawyer appointed under § 3599 determines that an incompetent capital habeas client cannot adequately act in his or her own interest, the lawyer must be able to pursue "the least restrictive action under the circumstances," and this must include moving for a stay of proceedings in appropriate circumstances. *See id.*

The ABA therefore requests that this Court conclude that appointment of counsel under § 3599 requires an attorney-client relationship that includes the right both to knowing, rational communication and decision-making by the capital habeas petitioner and, in appropriate circumstances, a stay of proceedings when the habeas petitioner is not competent to participate.

B. Courts Should Use A Flexible Standard In Determining Whether A Stay Is Appropriate Under The Circumstances.

As the ABA Task Force on Mental Disability and the Death Penalty stated in its *Report on Death Penalty and Persons with Mental Disabilities*:

> Many issues raised in collateral proceedings can be adjudicated without the prisoner's participation, and these matters should be litigated according to customary practice. However, collateral proceedings should be suspended if the prisoner's counsel makes a substantial and particularized showing that the prisoner's impairments would prevent a fair and accurate resolution of specific claims . . . .

Id. at 674 (citing, *inter alia*, *Council* v. *Catoe*, 359 S.C. 120, 597 S.E.2d 782, 787 (2004)); *Catoe*, 597 S.E.2d at 787 ("[T]he default rule is that [post-conviction review] hearings must proceed even though a petitioner is incompetent. For issues requiring the petitioner's competence to assist his [post-conviction] counsel, such as a fact-based challenge to his defense counsel's conduct at trial, the [post-conviction] judge may grant a continuance, staying review of these issues until petitioner regains his competence.").

Clearly, a showing that a client's incompetence will prevent a fair and accurate resolution of specific claims should be sufficient grounds for a stay, and where the lawyer makes such a showing, the court should stay the proceedings. *See Carter* v. *Florida,* 706 So. 2d 873, 875 (Fla. 1997) ("There can be no question that a capital defendant's competency is crucial to a proper

determination of a collateral claim when the defendant has information necessary to the development or resolution of that claim.").

However, the showing required should be flexible, depending on the prisoner's impairments and the circumstances of the case. For example, a stay may also be appropriate where incompetency prevents the determination of whether the client has viable claims. *See, e.g.*, *People* v. *Owens*, 564 N.E.2d 1184, 1187 (Ill. 1990) ("[Illinois Supreme Court Rule 651] is not satisfied where appointed counsel cannot determine whether a post-conviction petitioner has any viable claims, because the petitioner's mental disease or defect renders him incapable of communicating in a rational manner. In either circumstance, the appointment of an attorney is but an empty formality.") (internal citations omitted); Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Cath. U. L. Rev. 1169, 1180 (2005) ("[A] prisoner's impairments could obscure potentially valid claims, preventing counsel from finding out about them at all, or could inhibit his effective participation in an evidentiary hearing involving specific claims that are known to counsel.").

Further, a stay may be appropriate even when all of the facts relevant to the case appear to be widely known. In claims of ineffective assistance of counsel, for example, what was presented at trial will be set out in the record. However, a competent defendant may enhance his counsel's understanding of the importance of information known by counsel and provide information that was not presented, thereby enhancing his counsel's ability to demonstrate an unappreciated

importance of presented as well as missing information to the court. *See, e.g.*, *Holmes* v. *Buss*, 506 F.3d at 580 (noting that in pursuing post-conviction relief a client "may—if mentally competent—be able to convey to his lawyers a better sense of the alleged misbehavior of the prosecutor and of defense counsel than the trial transcript and other documentation provide").

Also, as to "strategic" choices—even those commonly perceived to be within the expertise of appellate counsel—it may be necessary for a client to be able to communicate with counsel when, under the Model Rules, they are choices for the client to make. As stated by the Seventh Circuit:

> When the issue is competence to *appeal*, the tactical question whether to plead incompetence and if one prevails perhaps remain on death row for the rest of one's life, or to press for a new trial even at the risk of another conviction and another death sentence, becomes all-important, and it is a question on which input from the petitioner is vital. It's not really a lawyer's decision at all, though the lawyer can advise on the likelihood that habeas corpus relief will be granted and, if so, that the petitioner will again be sentenced to death and perhaps have then no basis for seeking relief.

Holmes v. *Levenhagen*, 600 F.3d 756, 758-59 (7th Cir. 2010).

Finally, a stay may be appropriate where the lawyer informs the court that, contrary to his obligations to the client under the Model Rules, the

lawyer cannot conscientiously accede to his client's instructions because of evidence casting doubt on the client's mental competency. *See, e.g.*, *Rees* v. *Peyton*, 384 U.S. 312, 313-14 (1966) (directing trial court to determine "whether [Rees] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises").

As the *Report on Death Penalty and Persons with Mental Disabilities* explained:

> Thorough post-conviction review of the legality of death sentences has become an integral component of modern death penalty law, analogous in some respects to direct review. Any impediment to thorough collateral review undermines the integrity of the review process and therefore the death sentence itself.

Id. at 674. As illustrated in each of the circumstances above, a prisoner's competence to communicate rationally with counsel may be such an impediment. They also illustrate the variety and complexity of some of the difficulties that lawyers confront when attempting to establish that a stay is appropriate under the circumstances of their clients' incompetence and the facts of their cases.

Accordingly, the ABA requests that this Court hold that appointment of counsel under § 3599 requires both knowing, rational communication and decision-making by capital habeas petitioners and an appropriate stay of the proceedings when they are not

competent to participate, and that it also requires that the courts use a flexible standard, based on the particular incompetency of a petitioner and the circumstances of the case, in determining whether a stay is appropriate.

CONCLUSION

For the foregoing reasons, *amicus curiae* the American Bar Association respectfully requests that the decisions of the Courts of Appeals for the Sixth and Ninth Circuits be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 10-930 & 11-218

IN THE

Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
Petitioner,

—v.—

ERNEST VALENCIA GONZALES,
Respondent.

TERRY TIBBALS, WARDEN,
Petitioner,

—v.—

SEAN CARTER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS
FOR THE NINTH AND SIXTH CIRCUITS

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Ohio and the ACLU of Arizona are two of its statewide affiliates. Founded more than 90 years ago, the ACLU has participated in numerous cases before this Court involving the scope and meaning of federal habeas corpus, both as direct counsel and as *amicus curiae*. Through its Capital Punishment Project, the ACLU also represents individuals charged with capital offenses, as well as those who have already been convicted and sentenced to death.

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. As *amicus curiae*, the organization offers a unique perspective on federal criminal law questions because its members represent a majority of those individuals charged with federal crimes in every district, throughout all

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no one other than *amici curiae*, its members or its counsel made a contribution to fund the preparation or submission of this brief.

the circuits. Pertinent to Carter's and Gonzales's cases, NAFD members represent capital clients at trial, on appeal, and in federal habeas litigation. The questions before the Court are therefore familiar, and of substantial importance, to the NAFD and its members.

STATEMENT OF THE CASE

These cases involve two death row prisoners who have been found incompetent to participate in the litigation of their federal habeas petitions by virtue of their progressive mental illnesses.

Ernest Gonzales is an Arizona death-row inmate, found by a state psychologist to "suffer[] from a 'genuine psychotic disorder' and [to be] . . . 'unable to communicate rationally for any extended period of time, such as would be required by a legal proceeding.'" Pet. App. A3, C4-C6. Gonzales repeatedly refused visits from counsel (about whom he was irrationally suspicious), displayed delusions in letters to the courts, and appeared not to understand the legal proceedings. *See* Pet. App. A3, C2; Em. Motion for Writ of Mandamus 24; Supp. Br. in Support of Pet. for Mandamus 29, 33 and attachments. During state post-conviction proceedings, a state court found him incompetent and thus unable to represent himself (but ruled that state law did not require him to be competent for post-conviction proceedings to proceed). *See* Supp. Reply Br. in Support of Pet. for Writ of Mandamus 6; Dist. Ct. Doc. No. 102 (Mot. For Competency Determination and to Stay Proceedings and Attachments); Resp. Br. in Opp. 1; Pet. App. B3. The federal district court acknowledged expert reports for

both the State and Gonzales finding Gonzales incompetent to proceed, but ultimately held it was unnecessary to determine competency. *See* Pet. App. A3, C4-5, C24, C28. The Court of Appeals for the Ninth Circuit held that the record supported a finding that Gonzales was incompetent and that a stay of proceedings should issue. Pet. App. A1-A9.

Sean Carter is an Ohio death-row prisoner found by experts for both the State and Carter to suffer from debilitating schizophrenia. Pet. App. at 30-35a. Questions surrounding Carter's mental competence go back at least to the time of his 1998 trial, where this disputed issue divided the appointed psychiatric experts but was ultimately resolved by the trial judge against Carter. *State v. Carter*, 734 N.E.2d 345, 355-56 (Ohio 2000). Though the experts disagreed as to how well Carter could assist in his case, they both agreed that Carter could not "fully and articulately communicate with his counsel." *Id.* The federal district court credited these experts, and found Carter incompetent to proceed. Pet.App. 36a-42a, 47a. The Court of Appeals for the Sixth Circuit found that the district court determination was within its discretion based on the evidence, and directed the court to stay all claims requiring Carter's assistance. *Id.* at 8a-9a, 14a-15a.

SUMMARY OF ARGUMENT

1. For death-row prisoners, a federal habeas corpus petition under 28 U.S.C. § 2254 can be a life and death matter.[2] As this Court has acknowledged, "Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." *McFarland v. Scott*, 512 U.S. 849, 859 (1994).

Both Carter and Gonzales persuasively show that the lower courts properly stayed their federal habeas proceedings because, in both cases, mental illness makes them temporarily incompetent to participate. *Amici* endorse their legal arguments, but do not repeat them here. This amicus brief instead will answer, through case examples, two questions: First, in what ways might a competent death row prisoner meaningfully participate in the litigation of his petition? And second, by contrast, how might mentally incompetent prisoners be harmed by their inability to participate?

2. Contrary to the States' arguments, Pet. Tibbals Br. 25-26; Pet. Ryan Br. 14-15, a capital habeas petitioner's role is not limited to a passive wait on death row for the outcome of a "purely legal" proceeding handled exclusively by lawyers working remotely. The attorney-client relationship is a two-way street. See Br. for American Bar Association as *Amicus Curiae* (describing law and professional rules

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[2] For economy, the habeas provisions contained in sections 2254 and 2244 of Chapter 28 of the United States Code are hereafter cited merely with their section number, such as §2254 or §2244.

undergirding attorney-client partnership). And if the lawyer is required by experience and role to be more active, it does not follow that the petitioner is or becomes entirely passive in the prosecution of what is "likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence." *Holland v. Florida*, __ U.S. __, 130 S. Ct. 2549, 2564 (2010). As shown below, full access to that opportunity hinges on the prisoner's ability to be involved at various junctures that include: prompting counsel to timely file his habeas petition; prompting his lawyers to raise all viable federal claims; moving to substitute counsel when counsel fails to protect his rights; participating in the development of the facts where an evidentiary hearing has been ordered or sought; and participating in litigation of a variety of facts concerning the state-court proceedings that may well be significant, if not outcome determinative, in the litigation of the federal writ.

3. Although many condemned prisoners suffer from physical or mental illnesses or emotional problems that affect their ability to interact with counsel, few are ever found incompetent. For those who are found incompetent, like respondents here, their limitations severely constrain an attorney's ability to provide ethical and effective representation. Because the habeas petition belongs to the client, not counsel, the attorney carries specific duties with respect to the case, which are difficult, if not impossible, to fulfill without the active and able participation of the client. These include fact investigation, evaluation of the accuracy of the state court rulings and fact-findings, and determination and consideration of what may have transpired in

the proceedings but may not have been captured in the record. The second part of this brief illustrates the sort of problems that occur when a prisoner is held incompetent to participate in the proceedings, particularly in the needed development of facts at the federal writ level. These case stories demonstrate why it is necessary and appropriate for the district court to evaluate whether the habeas petition may proceed, given the client's condition.

4. Guided by section 2254 and other statutes, federal habeas courts root out unconstitutional death sentences and convictions. But they do so only with the participation of the litigants – the State, the prisoner's lawyer, and the prisoner. The reliability of their decisions would come into question if courts were forced to adjudge petitions with incompetent petitioners. A death-sentenced prisoner cannot be made an inanimate object, moved like a mere component of the court record through lawyer-driven litigation. He is instead a still-living, breathing person, with the combination of unique factual knowledge and unique motive that make his active involvement in the litigation vital.

The Court should affirm the judgments below.

ARGUMENT

I. COMPETENT DEATH-ROW PRISONERS CAN AND DO PLAY A CRITICAL ROLE IN HABEAS PROCEEDINGS.

The procedural and factual complexity of capital habeas litigation is well-known. *See, e.g., Martel v. Clair*, __ U.S. __, 132 S. Ct. 1276, 1285 (2012) (quoting Congress's statutory recognition of the "unique and complex nature of the litigation" in

18 U.S.C. § 3599 (d) (2006 ed.)). Before the constitutionality of a condemned prisoner's conviction or sentence may be even addressed, various rules, designed in part to uphold federalism and finality, must be followed. Some rules come from this Court's jurisprudence. *See, e.g., Teague v. Lane*, 489 U.S. 288 (1989). Others come from Congress, including most notably the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

The merits briefs of the States in these matters assume that prisoners have little to offer in this process, except as witnesses. Pet. Ryan Br. 14-15; Pet. Tibbals Br. 25-26. As discussed below, however, competent death-row prisoners can – and have – played a critical role in habeas actions in assuring both the procedural fairness and factual accuracy of the proceedings.

a. Protective responses to attorney failures

As is familiar, a state prisoner must file his federal writ within one year of the petition becoming final in the state court, with the clock tolled during the pendency of properly filed state post-conviction motions. § 2244(d)(1).

A death-row prisoner may elect to rely on his counsel to calculate the deadline and timely file a meaningful writ. But recent history teaches that he would do so at considerable risk. The Court described the attorney-client relationship as one of agency in *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). Absent extraordinary circumstances, *see Holland*, 130 S. Ct. at 2562-63, the prisoner will pay the price for the attorney's failure to file on time.

This juncture of the habeas litigation is the first of many in which the prisoner's competent participation can mean the difference between success or failure, life or death. As shown in the examples below, mentally competent prisoners have managed to overcome the failings of counsel who neglected to file their petitions, filed them late, or filed incomplete or inadequate petitions.[3]

1. Albert Holland might have sat in his Florida death-row cell and awaited word whether his appointed attorney had timely filed Holland's federal habeas petition (and for that matter the result of the petition). But Holland did not passively rely upon counsel. Rather, he did everything he could to protect himself. His effort proved central to the ultimate grant of relief in his case. *See Holland*, 130 S. Ct. at 2558.

Holland wrote his attorney "many letters emphasizing the importance" of filing a timely federal petition. *Id.* at 2552. He specifically asked his attorney "to make certain that all of his claims would be preserved for any subsequent federal habeas corpus review." *Id.* at 2555. He frequently contacted the Florida Supreme Court to learn the date it would (as he expected) deny his pending state post-conviction petition. *Id.* at 2555-56. That date was of great interest because, upon its denial, Holland would have had only twelve days left under AEDPA's one-year statute of limitations. *Id.* at 2556.

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[3] These examples are intended to sketch the outlines of the broad range of ways in which a competent prisoner may contribute to his habeas case. In particular, this Court's recent cases demonstrate the surprising ways in which prisoners may be required to rise to their own defense in these proceedings.

When Holland learned, through his prison library research, that the court had denied his petition some five weeks earlier, he immediately wrote out his own *pro se* federal habeas petition and mailed it to the district court. *Id.* at 2557.

Holland could try to protect himself only because he was able to research and understand the law. Indeed, he sought to teach the law to his deficient lawyer: in his letters to counsel, he "[i]dentified the applicable legal rules" as well as the due date of the petition. *Id.* at 2552. When Holland disagreed with counsel about whether the petition would be tolled under AEDPA, he told counsel in a letter. And as this Court noted, while Holland "was right about the law," his lawyer "was wrong." *Id.* at 2558.[4]

Based on Holland's actions, the State agreed that he had exercised the requisite "due diligence" for equitable tolling of his tardy habeas petition. *Id.* at 2565. This Court concurred and remanded to the Eleventh Circuit, *see id.*,[5] which in turn remanded to the district court. *Holland v. Florida*, 613 F.3d 1053 (11th Cir. 2010). The district court then resolved the tolling issue in Holland's favor, heard the petition on the merits, and held that he was entitled to relief

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[4] *Holland* presents an extreme example, but – in amici's experience – it is not uncommon for attorneys and clients to engage in dialogue about the law, and for clients to meaningfully advance the litigation, substantively or procedurally, when capable counsel is responsive.

[5] In *Holland*, this Court defined for the first time the extraordinary circumstances required for equitable tolling and remanded to the Eleventh Circuit to apply this new standard. *Id.* at 2565.

because he had unconstitutionally been denied his right to self-representation during the capital trial at which he had been sentenced to death. *See Holland v. Tucker*, __ F. Supp. 2d __, 2012 WL 1193294, *30 (S.D. Fla. April 03, 2012) (finding unreasonable application of *Faretta v. California*, 422 U.S. 806 (1975)). Holland now awaits a new trial, rather than execution.

If Holland had been mentally incompetent, like Carter and Gonzales, it is highly doubtful that his attorneys' errors would have ever been brought to light and he might never have been afforded the federal habeas review that ultimately remedied his unconstitutional capital trial.

2. Quintin Jones, who was sentenced to death in Texas, has also played a critical role in protecting his rights through active participation in his habeas litigation. *See generally Jones v. Thaler*, Case No. 4:05-cv-00638 (N.D. Tex) (docket and documents cited available on PACER).

During the pendency of his state post-conviction proceedings, Jones wrote his attorney at least eight times, requesting that the attorney look into various issues. *Jones*, Document 86, at 9. For example, Jones wrote in an early letter: "I don't know if you know about the *Wiggins* [*v. Maryland*, 539 U.S. 510 (2003)] case? Or the *Atkins* [*v. Virginia*, 536 U.S. 304 (2002)] case? What I'm saying I don't think or feel that my mental and social historys [sic] were really looked into . . . and I really think those cases would play a big role in my case if my history is really looked into and told the way it should have been . . ." *Id.* at 9. Initially, his lawyer failed to

respond; then, the lawyer failed to include the claims in his post-conviction application. *Id.* at 9-10.

When Jones learned that the Texas high court had denied that application, it was only because the State Attorney General's Office had copied him on a letter to his counsel. *Id.* at 4, 10. By this time, only six months remained on AEDPA's one-year clock. Jones immediately, and unsurprisingly, told counsel that he did not want him to continue on the case in the federal courts. *Id.* at 10. Jones also wrote the district court and asked that his counsel not be appointed on the federal case. *Id.* at 19. The court, however, appointed the lawyer over Jones's objection. *Id.* at 20.

The attorney again failed Jones. He filed the writ out of time and failed to respond to the State's motion to dismiss it, resulting in dismissal of the writ. *Id.* at 4-5.

On Jones's prompting, the district court later appointed new counsel, who immediately moved for relief from judgment, citing Jones's diligence in protecting and asserting his own rights. *Jones*, Document 35, at 18. The district court granted the motion and allowed new counsel to respond to the State's dismissal motion, which he did, arguing that the time for filing Holland's petition should be equitably tolled due to attorney abandonment. *Jones*, Document 86, at 5. That issue reached the Fifth Circuit, which remanded to the district court to consider Jones's request under *Holland*, *supra*. *See Jones v. Thaler*, 383 F.Appx. 380 (5th Cir. 2010).

At this time, that issue remains pending in the district court. And Jones remains alive. If

incompetent like Carter and Gonzales, he could not have taken the steps that have so far saved his life and allowed him a chance at federal review.

3. Chris Shuffield is another Texas death-row inmate whose ability to stand up for himself, in the face of attorney incompetence, has probably saved his life. *See Shuffield v. Thaler*, 6:08-cv-180 (E.D. Tex) (docket and documents cited available on PACER and on file with author).

After the Texas Court of Criminal Appeals denied his state post-conviction motion, Shuffield knew he needed better counsel,[6] and asked his attorney to withdraw from his anticipated representation in federal habeas proceedings. The attorney agreed, and the district court appointed new counsel. *Shuffield*, Document 1, at 1, ¶ 4; *Shuffield*, Document 19 (Order Granting Motion to Substitute New Counsel), at 1. But new counsel did no better.

New counsel filed a "skeletal petition" that contained "numerous typographical errors, and . . . nearly all of the arguments . . . were 'boilerplate' contentions which appear to have been copied from an application filed on behalf of a different inmate." *Id.* at 2. Shuffield then filed a *pro se* motion asking that counsel be substituted. *Id.* Counsel responded by sending Shuffield a "corrected" version, which Shuffield reported was "worse than the original skeletal application." *Id.* at 2. Noting this shoddy

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[6] The attorney filed only three claims, none of which were cognizable. *See Ex parte Shuffield*, Order, Case No. WR-69454-01, 2008 WL 1914747, *1 (Tex. Crim. App. April 30, 2008) (unpublished) ("Applicant has not raised any cognizable claims. Relief is denied.").

work, the district court again granted Shuffield's motion to substitute counsel. *Id.* at 3.

Shuffield's partnership with his second replacement counsel appears to have worked out better. The district court has granted substitute counsel's motion under *Rhines v. Weber*, 544 U.S. 269, 276-78 (2005), to stay the habeas proceedings so that he could return to state court to exhaust a claim under *Brady v. Maryland*, 373 U.S. 83 (1963). *Shuffield*, Document 47, at 6. And the Texas Court of Criminal Appeals has recently found "that the requirements for consideration of a subsequent application have been met and . . . remanded [the case] to the trial court for consideration of" this claim. *Ex Parte Shuffield*, Order, Case No. WR-69454-01, 2012 WL 130275 (Tex. Crim. App. Jan. 11, 2012).

Like Holland and Jones, Shuffield remains alive and his case remains in litigation. But if he had been mentally incompetent when professionally incompetent attorneys were handling his case, he could well have lost, if not his life, at least his opportunity for important federal habeas review of his conviction and death sentence.

b. Petitioner involvement in evidentiary hearings

Even in the wake of *Cullen v. Pinholster*, __ U.S. __, 131 S. Ct. 1388 (2011), this Court has acknowledged a continuing need for evidentiary hearings in some circumstances. *Id.* at 1401. *See also id.* at 1412 (Breyer, J., concurring in part and dissenting in part) (suggesting scenarios in which

hearings would be appropriate).[7] As the Court is well aware, the condemned prisoner has the right to be present for an evidentiary hearing. *See* 28 U.S.C. §2243 (guaranteeing prisoner's right to be present at evidentiary hearing); *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950) (noting that presence of petitioner at hearing "is inherent in the very term 'habeas corpus'"). In order to exercise that right, the prisoner must, of course, be competent. *See* U.S. Br. 29. If he is not, he will be unable to follow witness testimony, inform counsel if the testimony appears untruthful or inaccurate, propose lines of cross-examination and, in some cases, take the witness stand and testify himself. It is, therefore, beyond any reasonable dispute that when a court holds an evidentiary hearing, "a capital prisoner's testimony or assistance might be crucial to a potentially

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[7] When appropriate, lower courts have approved evidentiary hearings post-*Pinholster*. *See, e.g., Winston v. Pearson*, __ F.3d __, 2012 WL 2369481, at *7-11 (4th Cir. June 25, 2012) (rejecting State's new argument under *Pinholster* and reaffirming *Winston v. Kelly*, 592 F.3d 535, 552-53 (4th Cir. 2010) (finding no abuse of discretion to hold hearing on colorable *Atkins* claims on which the state court had never provided a hearing)); *Lee v. Glunt*, 667 F.3d 397, 406-07 (3rd Cir. 2012) (remanding to district court and granting discovery and possible evidentiary hearing depending on outcome of discovery); *Thompson v. Parker*, No. 5:11–CV–31, 2012 WL 1567378, at *4-6 (W.D. Ky. May 2, 2012) (granting evidentiary hearing to death-sentenced inmate in Kentucky whose federal claim had not been addressed on the merits during state-court review); *Brumfield v. Cain*,__ F. Supp. 2d __, 2012 WL 602163, at *11-12 (M.D. La. Fed. 23, 2012) (rejecting State's claim that, under *Pinholster*, evidentiary hearing already held by district court was improper because state court decision on federal claim satisfied both § 2254 (d)(1) and (d)(2), and granting habeas relief).

meritorious habeas claim." *Id.* *See also* Resp. Carter Br. 30-37.

To be effective, however, a prisoner's involvement in the proceeding can and must begin long before an evidentiary hearing is even granted. As this Court has noted, the course of an investigation "depends critically" on information obtained by counsel from the client. *Cf. Strickland v. Washington*, 466 U.S. 668, 691 (1984). As a result, a prisoner in habeas proceedings must be and remain competent throughout the course of representation, so that he may suggest investigation to conduct and witnesses to interview to develop claims that might warrant a hearing. The case law illustrates how important a competent client's input in an investigation may be. *See, e.g., Johnson v. Secretary, Dep't of Corrections*, 643 F.3d 907, 933 (11th Cir. 2011) (describing case as one "in which counsel failed to adequately investigate what his client did tell him"); *Goodwin v. Johnson*, 632 F.3d 301, 319 (6th Cir. 2011) (in finding inadequate investigation by trial counsel after evidentiary hearing, noting that counsel "had little contact with [the client] and his family . . ."); *Lockett v. Anderson*, 230 F.3d 695, 712 (5th Cir. 2000) (relying, after evidentiary hearing, in part on client's statement that counsel "only met me twice in the entire time he was preparing my cases" to find inadequate investigation).

It is not enough that the client be competent at the outset of representation, and then competent again at the hearing. Both the attorney-client relationship and the development of the case require collaboration during the interim, particularly in the

run up to a hearing. *See* Br. for American Bar Association as *Amicus Curiae*.

c. Participation in fact-bound determinations in federal litigation looking back on state-court proceedings

Under AEDPA, a federal habeas court reviews the state court decision not only to see if it is contrary to, or involves an unreasonable determination of, clearly-established federal law, § 2254 (d)(1), but also to decide if it involved "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254 (d)(2).[8] Such factual review is necessarily aided by the participation of the prisoner who can assist counsel in identifying facts relevant to his federal claims from what can be a "voluminous record," *Miller-El v. Dretke*, 545 U.S. 231, 256 n.15 (2005), interpreting the cold state record, and seeing that the state record before the federal court is complete.[9]

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[8] A preliminary question before the section 2254 (d) analysis is purely factual: did the state courts rule on the federal claim? *See Cone v. Bell*, 556 U.S. 449, 472 (2009) ("Because the Tennessee courts did not reach the merits of Cone's *Brady* [*v. Maryland*, 373 U.S. 83, 83 (1963)] claim, federal habeas review is not subject to the deferential standard that applies under AEDPA . . . [and instead] . . . the claim is reviewed de novo."). When they have not, the federal court will be forced into the position of the first review court to address the factual aspects of the federal claim. *Id.* at 473-76 (engaging in fact-intensive analysis of materiality of evidence suppressed by State). Here, again, prisoner participation is inherently important.

[9] What constitutes the state record to be reviewed under section 2254(d) is not always self-evident. *See, e.g., Miller-El*, 545 U.S. at 241 n.2 & 256 n.15 (conducting analysis under § 2254 (d)(2)

Section 2254 (d)(2) review is a key component of AEDPA, requiring the federal court to determine whether a state court's decision rested on an unreasonable determination of the facts. Although this provision contemplates respect for state judgments, it does not *preclude* a finding that the state court's factual determinations were unreasonable. *See, e.g., Miller-El*, 545 U.S. at 240, 266 (finding state courts' ruling that the prosecutor's peremptory challenges were not "racially determined" an unreasonable determination of the facts in light of the evidence presented in the state proceedings).[10] A federal court's review of the state

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and considering "juror questionnaires, along with juror information cards, . . . added to the habeas record after the filing of the petition in the District Court" and observing "it is not clear to what extent [this] material expands upon what the state judge knew"); *id.* at 279 (Thomas, J., dissenting) (stating that the majority "bases its decision on juror questionnaires and juror cards that Miller-El's new attorneys unearthed during his federal habeas proceedings and that he never presented to the state courts"). *See also* Rule 7(b), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (permitting, under designated circumstances, the district court to expand the record under review).

[10] *See also Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (finding the state court erred in using pre-*Atkins* sentencing evidence related to competency to decide an *Atkins* issue and thus made "an unreasonable determination of the facts in light of the record evidence (or lack thereof) before it in violation of § 2254(d)(2)."); *Brumfield*, __ F. Supp. 2d __, 2012 WL 602163, at *11; *Ben-Yisrayl v. Davis*, 431 F.3d 1043, 1049 (7th Cir. 2005) (finding unreasonable determination of facts involving prosecutor's comments at trial); *Norton v. Spencer*, 351 F.3d 1, 7 (1st Cir. 2003) (finding unreasonable determination of facts involving affidavit submitted in state courts).

court's application of federal *law* to the given facts under Section 2254 (d)(1) can also involve thorny factual issues. *See, e.g., Wiggins*, 539 U.S. at 532-34 (finding, after extensive review of the facts, including seemingly conflicting facts, that by "deferring to counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied *Strickland*").

Fact-bound inquiries require a competent prisoner. State post-conviction counsel often changes when the case moves to federal court. A prisoner's memory of facts and nuances (such as the demeanor of a witness on the stand if there was a hearing) are as critical to effective representation and fact determination in federal habeas as in the earlier assessment of trial.

These backward-looking reviews are informed by the client's real-time experience of the events documented in the cold record. And, as the Court has repeatedly recognized, the cold record does not always tell the whole story. *See Skilling v. United States*, 130 S. Ct. 2896, 2918 (2010) ("In contrast to the cold transcript received by the appellate court, the in-the-moment voir dire affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service."); *Snyder v. Louisiana*, 552 U.S. 472, 490 (2008) (Thomas, J., dissenting) ("The trial court, *with the benefit of contextual clues not apparent on a cold transcript*, was better positioned to evaluate whether Ms. Scott was merely soft-spoken or seemed hesitant in her responses.") (emphasis added); *Uttecht v. Brown*, 551 U.S. 1, 17 (2007) ("We do not know anything about

his demeanor, in part because a transcript cannot fully reflect that information but also because the defense did not object to Juror Z's removal.").

The prisoner's perspective of the state proceedings under federal review thus will often be indispensable.

d. *Prisoner's role in questions of procedural default*

A state prisoner seeking federal habeas review of federal claims must demonstrate that any state procedural defenses were not proper bars to review, as federal habeas review will generally not be available if the state court rejected the claim based on a firmly-established and regularly-followed state procedural rule. *See, e.g., Walker v. Martin*, __ U.S. __, 131 S. Ct. 1120, 1128 (2011). Again, this requires a backward look at the facts of the state-court proceeding. Like any fact-based review, it requires client participation.

1. Eric Clemmons's case provides an example. Clemmons spent over a decade on Missouri's death row for a murder he did not commit. *See generally* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3110 (last visited on July 25, 2012). His habeas petition hinged on claims that he presented in a *pro se* appeal in state court, but which did not appear in his counseled appeal. The federal district court initially rejected them, but Clemmons was able to persuade the federal appellate court that his claims were not procedurally barred, because they had been raised in his *pro se* brief. *See Clemmons v. Delo*, 124 F.3d 944, 948 (8th Cir. 1997).

If Clemmons had become mentally incompetent between state and federal post-conviction review, the significance of his *pro se* filings might well have been lost and, with it, his one chance at federal review of his unconstitutional trial. [11]

In ruling for Clemmons, the circuit court noted that whatever a lawyer does, the client "is and always remains the master of his cause. Here, Clemmons did the only thing he could do [to preserve a claim his counsel refused to bring]: he tried to bring the issue to the attention of the Missouri Supreme Court himself." *Id.* The court therefore held that "the claim was fairly presented, and that the merits are now open for decision on federal habeas corpus." *Id.* at 949. The court then found Clemmons's constitutional claims meritorious, granted the writ, and ordered that the State release him or provide him with a retrial free from constitutional taint. *Id.* at 956.

Clemmons could not have participated in federal review if, like Carter and Gonzales, he had been incompetent and unable to communicate with his lawyers. Without his active participation in both the state and federal courts, he could well have been executed for a crime he did not commit.

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[11] *Cf. Taylor v. Wilkinson*, 389 F.Appx. 380, 382 (5th Cir. 2010) (noting that the district court did not have a copy of "the complete state court record and specifically did not have a copy of" the prisoner's state post-conviction application, which the prisoner provided to the appellate court). As noted above, for a federal judge reviewing state proceedings to which she was not party, the four corners of the state record are not always readily identifiable. But the same is not true for the prisoner, who was present and party to the state proceedings.

Clemmons never returned to death row. On retrial, the jury acquitted him. *See Clemmons v. Armontrout*, 477 F.3d 962, 965 (8th Cir. 2007).

2. Even if there is a procedural default, the federal claim may still be reviewed if the prisoner can show "cause and prejudice." *Maples v. Thomas*, __ U.S. __, 132 S. Ct. 912, 919 (2012). Again, this requires a factual review of what happened in the state courts, in which client participation is important. *Maples* provides a good example.

Cory Maples waited on Alabama's death row for a decision from the trial court on his post-conviction motion, which had included a claim of ineffective assistance of trial counsel. If the trial court denied the motion, he would inch one step closer to execution and would have just 42 days to file a notice of appeal. *Id.*

But word from his lawyers, associates in a large New York law firm, never came. *Id.* Maples only learned of the trial court's denial when the *state's* attorney wrote him. *Id.* The letter informed Maples of the missed deadline, and notified him that four weeks remained during which he could file a federal habeas petition. *Id.* No copy was sent to Maples's attorneys of record, or to anyone acting on Maples's behalf. It was up to Maples to respond to try to save his appeals and his life. *Id.*

Maples "immediately" contacted his mother, who in turn contacted the law firm. *Id.* at 920. Then, Maples learned that his attorneys had left the firm, and abandoned his case. Different attorneys from the law firm got involved and made attempts to resurrect the time-barred appeal.

The Alabama courts held the ineffectiveness claim time barred, and then the lower federal courts sitting in habeas review held that Maples had procedurally defaulted the claim. *Id.* at 920-21. Ultimately, this Court held that attorney abandonment served as cause for the procedural default.[12] *Id.* at 928.

Maples was able to begin to repair the damage from his attorney abandonment because he read, understood, and acted on the letter from the State's attorney. He could not have done so if he had been incompetent.[13] And, if incompetent at the federal habeas stage, he would have been no help to his attorneys in untangling the fact-bound question of his attorney abandonment in the state courts.

e. *Cause and prejudice due to ineffective assistance of post-conviction counsel*

The district court will sometimes need to engage in a related fact-based cause and prejudice inquiry when the first opportunity a prisoner has to raise a claim of ineffective assistance of trial counsel arises in a state post-conviction proceeding in which he has no Sixth Amendment right to the effective assistance of counsel. Under this Court's recent

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[12] The Court remanded to the Eleventh Circuit to determine whether Maples could show prejudice sufficient to permit his federal claims to proceed. *Id.* at 928. *See also id.* at 922 (explaining cause and prejudice test).

[13] Although the attorney-failure Maples responded to occurred in the state courts, as the Texas cases above show, it could just as easily happened in other cases in the federal courts. In such circumstances, only a competent prisoner would have the capacity to protect his own rights, and in turn his life.

decision in *Martinez v. Ryan*, 566 U.S. __, 132 S. Ct. 1309 (2012), a prisoner in these circumstances who has procedurally defaulted his trial ineffectiveness claim, may show cause and prejudice sufficient to allow federal review of the claim if he had no state right to counsel in this proceeding or if post-conviction counsel was ineffective under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984).

Under *Martinez* then, just as the trial ineffectiveness question is a fact-bound inquiry in which the prisoner would certainly participate at the state post-conviction level, the question of post-conviction counsel's ineffectiveness (necessary to resolve cause and prejudice) is one in which the prisoner would need to communicate with counsel during federal habeas litigation.

The facts of *Martinez* show just how involved a prisoner may need to be in this inquiry. Martinez had one lawyer appointed at trial, and another on direct appeal. *Martinez*, 132 S. Ct. at 1314. Arizona law did not permit appellate counsel to argue on direct appeal that trial counsel was ineffective; such claims are reserved for state collateral proceedings. *Id.* But although Martinez's attorney initiated post-conviction proceedings, she "made no claim trial counsel was ineffective and later filed a statement asserting she could find no colorable claims at all." *Id.*

Martinez then received notice that he would be required within 45 days to file a *pro se* petition in support of the motion for post-conviction relief. *Id.* "Martinez did not respond. He later alleged that he was unaware of the ongoing collateral proceedings and that counsel failed to advise him of the need to

file a *pro se* petition to preserve his rights." *Id.* Based on his inaction and the statement by counsel that he had no colorable claim, the Arizona courts dismissed his post-conviction petition. *Id.* A year and a half later, represented by new counsel, he filed a second notice of post-conviction relief. *Id.*

This Court decided in *Martinez* that the cause and prejudice requirement would be satisfied if post-conviction counsel were found to have performed ineffectively, but the Court did not decide if that were so. *Id.* at 321. Rather, it remanded to the circuit court for a determination of that question. Litigation of this intensely fact-bound claim, in which Martinez himself played a central role, could only proceed with his active participation.

f. *Prisoner role in stay and abeyance*

District courts have the authority, under certain circumstances, to temporarily stay section 2254 proceedings, and to hold the petition in abeyance, so that a prisoner may return to the state courts and exhaust a (theretofore unexhausted) federal claim. *See Rhines v. Weber*, 544 U.S. 269 (2005).

Charles Russell Rhines was a prisoner on South Dakota's death row when he filed his *pro se* petition for a writ of habeas corpus, followed by a *pro se* motion to toll the time on the AEDPA one-year clock. *Rhines v. Weber*, 408 F. Supp. 2d 844, 847-48 (D.S.D. 2005). Later, with appointed counsel, he filed an amended petition and, after the one-year clock had expired, the district court ruled that several of his claims had not been exhausted in the state courts. *Id.* at 846. Rhines asked the court to

stay and abate his habeas petition while he returned to state court to exhaust the claims. *Id.* The district court did so, but the court of appeals reversed.

This Court upheld the authority of district courts to stay and abate petitions while unexhausted claims are pursued in state court, provided that certain conditions are met. *Rhines*, 544 U.S. at 277-78. First, the prisoner must show "good cause" for failing to exhaust the claims in the state courts. *Id.* at 277. Second, he must show the claims were not "plainly meritless." *Id.* Third, "if a [prisoner] engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all." *Id.* at 278.

Here again is a fact-intensive test to be resolved in federal habeas review, and one hinging on facts not necessarily in the existing state record. Whether or not claims (never previously heard) are "plainly meritless" requires a fact-based review of the trial or direct appeal; "good cause" for failure to exhaust will require review of state post-conviction proceedings as well. The petitioner's right to proceed with federal review of constitutional claims will be determined by these fact-based inquiries. Professionally competent counsel will, of necessity, depend upon a mentally competent client's memory and understanding of what are often extra-record facts underlying such claims.

For Rhines, these questions were ultimately answered on remand to the district court. *See Rhines*, 408 F. Supp. 2d at 853. The district court engaged in this three-part inquiry, finding that Rhines was "confused" about the exhaustion issues and that his post-conviction counsel had been

ineffective for failure to raise the unexhausted claims. *Id.* The court also commented that Rhines himself had not been derelict in pursuing his claims: "there is nothing in the record to indicate that Rhines's allegations of ineffective assistance of counsel are frivolous or that Rhines should have been aware that his post-conviction counsel should have raised the issues on appeal." *Id.* at 849. The court then conducted a preliminary analysis of the merits of the claims Rhines sought to exhaust in the state courts, all claims involving the facts of his trial, including a claim of ineffective assistance of trial counsel. *Id.* at 850-54. Lastly, in analyzing whether Rhines had engaged in delay tactics, the district court found he had not and cited, in part, Rhines's initial *pro se* filing of his habeas petition.

The analysis of the availability of stay and abeyance in *Rhines* involved facts and questions about which Rhines obviously had peculiar knowledge, and claims which had never before been heard. His participation was undeniably important. But he could not have participated at all – or won his stay and abeyance – if he had been mentally incompetent.

Under *Rhines* then, motions for stay and abeyance are yet another part of the federal habeas landscape involving intensive factual explorations of the state-court proceedings in which the prisoner's participation and ability to communicate is vital.

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At numerous junctures in the litigation of federal habeas petitions, a death-row prisoner's competent participation can prove crucial. Without

it, the prisoner would risk forfeiting, through no fault of his own, the full and fair federal habeas review that plays "'a vital role in protecting constitutional rights.'" *Holland*, 130 S. Ct. at 2562 (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)).

II. INCOMPETENT DEATH ROW PRISONERS CANNOT PROVIDE COUNSEL WITH THE NECESSARY ASSISTANCE IN FEDERAL HABEAS PROCEEDINGS.

Given their incompetence, neither Carter nor Gonzales would have been able to protect their own interests or assist counsel, as outlined above. The cases that follow offer additional examples of critical tasks incompetent clients cannot perform during federal habeas proceedings. These incompetent clients were unable to assist in needed fact development, answer questions propounded by the district court, and participate in psychological testing fundamental to resolving their federal claims.

a. Like Cory Maples, Clarence Simmons faced possible execution in Alabama. But Simmons's situation was the reverse of Maples's. Unlike Maples, Simmons was mentally incompetent; unlike Maples's lawyers, Simmons's lawyers were remarkably diligent in protecting him. *See generally Simmons v. Culliver*, Case No. 2:08-cv-00419-RDP (N.D. Ala. Aug. 13, 2008).

Cognitive and neuropsychological testing showed that Simmons had "severe, multi-factoral dementia, as well as potential onset Alzheimer's disease." Motion for Hearing to Determine Competency (on file

with author of this brief), at 2.[14] As a result, Simmons experienced "disorientation to person, place and time, and profound loss of short term memory" as well as "widespread impairment of personal historical memory." *Id.* at 5. In 2004, Simmons had suffered a stroke resulting in additional cognitive impairment, including an inability "to understand simple questions, and the inability of the examiners, at times, to understand Mr. Simmons." *Id.* at 6.

On Simmons's behalf, his federal habeas counsel raised claims of ineffective assistance of counsel and a claim questioning Simmons's competency at the time of trial. There were no hearings in state court on these claims, and "[m]any of the facts necessary to support or litigate these claims [were] in the sole possession and knowledge of Simmons." *Id.* at 8. That left litigation of the factual issues to begin, for the first time, at the federal habeas stage. But counsel was unable to do so with Simmons so incompetent that he could neither understand nor be understood.

Indeed, Simmons was unable to undertake basic tasks asked of him by the district court. In July of 2008, the district court issued an order requiring Simmons to certify that he met with his attorney, understood the concept of "waiver" of claims, and was satisfied with the representation of counsel. *Id.* at 3.

In response to the order, counsel stated that Simmons was not able to comply because Simmons could not understand the content of the order, could

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[14] PACER does not make available the docket or the pleadings in this case, saying merely that the case was "closed 09/01/2011."

not communicate with counsel, and could not comply with his obligations under the order. *Id.* at 18. Counsel explained that the "comprehension required to understand the court's [o]rder reaches far beyond Simmons's present abilities." *Id.*

The order also required counsel to explore with Simmons "'all potential grounds for relief including . . . whether the petitioner was not mentally . . . competent to stand trial.'" *Id.* Counsel explained that "Simmons does not understand the concept of competency. He is unaware that he is currently incompetent and is thus unable to speak in any meaningful way regarding his competency eleven years ago at trial." *Id.*

Finally, the order required Simmons to register complaints about habeas counsel immediately with the court or waive any claim about counsel's incompetence. *Id.* at 19. Counsel, however, explained that Simmons neither recognized counsel after meeting them repeatedly nor understood counsel's job or reason for assisting him. *Id.*

Because Simmons was mentally unable to provide his counsel with the facts they needed to litigate his petition, and unable to provide the district court with what it required of habeas litigants, the district court correctly found Simmons incompetent and, on September 1, 2011, issued an order removing Simmons's case from the active docket.

b. Joe Luis Dansby sat on Arkansas death row, and "refused to meet with either his counsel or mental health professionals employed by his counsel for over two years." *Dansby v. Norris*, No. 02-4141,

2009 WL 485418, at *2 (W.D. Ark. Feb. 26, 2009). As a result of Dansby's refusal, counsel and their experts could not prepare for a scheduled federal hearing on the issue of whether Dansby was mentally retarded and therefore could not be executed under *Atkins v. Virginia*, 536 U.S. 304 (2002).

The district court noted that Dansby "must be able to communicate and cooperate with counsel and mental health professionals to elicit information to support his claim of mental retardation; at a minimum, [he] must be able to participate in a mental health evaluation on the issue of intelligence." *Id.* at 2. Based on this need, the court granted Dansby's counsel's motion to allow a cell-side visit by their mental health expert. *Id.* at 3. Currently, all litigation is stayed until the district court determines if Dansby is competent to proceed.

Jack Gordon Greene is also on Arkansas's death row. And his lawyers also believe he is mentally retarded. *See generally Greene v. Norris*, No. 5:04-cv-00373-SWW (E.D. Ark.) (docket and cited documents available on PACER).

Greene testified in the federal court that he wished to withdraw his *Atkins* claim. *Greene*, Document No. 101 (Order), at 1. His attorneys told the court that Greene "lacks the capacity to appreciate his position and make a rational choice with respect to pursuing or abandoning an *Atkins* claim and that Greene is incompetent to proceed with any aspect of this litigation." *Id.* The district court ordered that Greene be taken to a medical facility for evaluation. *Id.* at 2.

In both cases, the factual issue of mental retardation requires resolution at the federal habeas stage. And in both cases, possible mental incompetence makes the prisoners' knowing, intelligent and voluntary participation in the *Atkins* claim impossible. But for a district court's ability to stay proceedings due to a habeas petitioner's incompetence, these prisoners and others like them would be at risk of being executed without ever having a full and fair hearing under *Atkins*.

c. In 2001, while on Nevada's death row, Michael Mulder suffered a stroke. As a result, he has "irreversible brain damage, is intellectually disabled (mentally retarded), has receptive and expressive aphasia, is incompetent, cannot assist counsel" and "cannot direct or meaningfully participate in his federal habeas proceedings." Petitioner's Pre-Hearing Brief Regarding Counsel's Motion To Stay Federal Habeas Corpus Proceedings at 3, *Mulder v. McDaniel*, 3:09-cv-00610-PMP, 2011 WL 4479771 (D. Nev. filed July 20, 2011) (docket and documents cited available on PACER).

These problems arose during state post-conviction proceedings, when post-conviction counsel was trying to elicit information needed to litigate Mulder's claim of ineffective assistance of trial counsel. *Mulder*, Document 71 (Evid. Hr'g Tr.) at 451-52. Mulder's stroke caused him great difficulties in communicating with post-conviction counsel. *Id.* at 436-37. Indeed, counsel would later testify that Mulder had been incapable of assisting him with these fact-intensive post-conviction claims. *Mulder*, Document 71 at 452. Counsel's motion to stay the litigation due to Mulder's incompetency, was

however denied. *Mulder*, Document 74 (Order Granting Stay), at 2.

In 2009, Mulder was appointed federal habeas counsel, who experienced the same communication issues. Counsel was particularly concerned with his ability to raise a claim of ineffective assistance of counsel given that the issue had not been raised on direct appeal, *Mulder*, Document 74, at 2, and had only been raised in post-conviction under similarly inadequate circumstances: that is, uninformed by any meaningful conversation with Mulder.

Under these circumstances, the district court found Mulder incompetent because he is unable to rationally communicate with his lawyer concerning claims that require his participation. *Mulder*, Document 74 (Order Granting Stay), at 31.

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A mentally competent death-row prisoner can contribute in multiple ways in the process of federal habeas review. The judge hearing such claims can do her job with confidence that the attorneys have not missed or misinterpreted important facts crucial to the federal claim. The attorney with a competent client has a partner with first-hand knowledge of crucial facts and the motivation to see that those facts come to light. And the State can draw comfort knowing that the adversarial process in a life-and-death case has been fair and complete. But without the prisoner's competent participation, the prisoner risks losing what is "likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence." *Holland*, 130 S. Ct. at 2564. As Respondents Carter and

Gonzales have shown, district courts should be entrusted with the authority to manage this risk by staying petitions of incompetent death-row prisoners when necessary.

CONCLUSION

The judgments below should be affirmed.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Nos. 10-930 & 11-218

IN THE
Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

ERNEST VALENCIA GONZALES,
Respondent.

TERRY TIBBALS, WARDEN,
Petitioner,

v.

SEAN CARTER,
Respondent.

On Writs of Certiorari
to the United States Courts of Appeals
for the Ninth and Sixth Circuits

BRIEF OF AMERICAN PSYCHIATRIC ASSOCIATION AND AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amicus American Psychiatric Association ("APA"), with more than 36,000 members, is the Nation's leading organization of physicians specializing in psychiatry. APA has previously filed briefs for this Court's consideration in similar cases, including *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Sell v. United States*, 539 U.S. 166 (2003); and *Ford v. Wainwright*, 477 U.S. 399 (1986). APA's members are physicians engaged in treatment, research, and forensic activities, and many of them regularly perform roles in the criminal justice system. APA and its members have substantial knowledge and experience relevant to the issues in this case. APA also has an interest in ensuring that this Court's decisions that concern individuals with mental disorders and disabilities are informed by the best available scientific knowledge.

In addition, as Part II of this brief sets forth in greater detail, APA has previously taken a position as a matter of policy on the question presented in this case. In 2003, the American Bar Association ("ABA") established a Task Force on Mental Disability and the Death Penalty (the "Task Force"), which

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represents that all parties have consented to the filing of this brief. Petitioner and respondent in No. 11-218 and respondent in No. 10-930 have filed with the Clerk letters granting blanket consent to the filing of *amicus* briefs; a letter reflecting the consent of petitioner in No. 10-930 is being submitted contemporaneously with the filing of this brief.

included mental health professionals who were members and representatives of APA.

The Task Force was convened in light of this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Its function was to address unresolved issues concerning the application of the death penalty to persons suffering from impaired mental conditions. As relevant here, the Task Force recommended essentially that post-conviction proceedings initiated by a capital prisoner should be suspended when a mental disorder or disability prevents the prisoner from understanding his situation or communicating with his counsel, and when such communication would be necessary to the fair adjudication of that prisoner's legal challenges to his conviction or sentence. APA, ABA, and several other organizations adopted this recommendation, which is attached as an Addendum to this brief. APA has an interest in presenting arguments in support of its position to this Court.

Amicus American Academy of Psychiatry and the Law ("AAPL"), with approximately 1,800 psychiatrist members dedicated to excellence in practice, teaching, and research in forensic psychiatry, has participated as an *amicus curiae* in, among other cases, *Brown v. Plata*, 131 S. Ct. 1910 (2011); *Indiana v. Edwards*, 554 U.S. 164 (2008); *Clark v. Arizona*, 548 U.S. 735 (2006); and *Penry v. Johnson*, 532 U.S. 782 (2001).

SUMMARY OF ARGUMENT

This Court has long recognized that federal district courts have inherent power to stay proceedings before them, and it has recently reaffirmed in *Rhines v. Weber*, 544 U.S. 269 (2005), that this discretionary stay authority extends to federal habeas cases. District courts can and should use that stay authority – consistently with venerable common law principles – to assure the reliability and integrity of habeas proceedings. That assurance is much needed when prisoners who have been sentenced to death are prevented by mental disorder or disability from necessary communication with counsel. Justice Powell's concurring opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986), reinforces the importance of competency during post-conviction review, because Justice Powell relied on such review as part of a comprehensive process for ensuring the reliability of a conviction before a prisoner is put to death.

When using its stay authority for this purpose, a district court should focus its attention on whether the prisoner seeking habeas relief has shown a lack of the basic competence and ability to communicate with counsel that would be *necessary* for a *fair* resolution of his constitutional challenges to his conviction or death sentence. This standard, formulated by the Task Force and endorsed by APA and several other organizations, reflects an appropriate balancing of the relevant interests. In applying that standard, the district court should give adequate weight to the purposes of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") in promoting comity and finality as part of its discretionary-stay analysis.

Although the decision whether to stay a particular habeas case will necessarily be judicial rather than medical, medical expertise can assist a court in making its determination. The forensic psychiatric analysis of competency to stand trial takes place in an area that has been researched extensively. Available tests for competence developed in the trial context are reliable, validated by studies, and continuing to improve. To the extent petitioners have raised concerns that capital prisoners will malinger or feign symptoms in order to delay execution, these problems are not different in kind from those that forensic practitioners deal with every day. Screening and testing instruments for malingering have been developed and tested, and work on them continues.

Finally, this Court should not be swayed by petitioners' predictions that an affirmance would lead to long-term delay. On the contrary, most defendants who are found to lack competence to stand trial are restored to competence within a reasonable period of time. Many prisoners in cases such as this one will likely return to competence relatively quickly, in much the same way. And, to the extent they continue to lack competence for a longer period, states' interests will be only minimally (if at all) injured, because the kind of long-term mental problem that could foreseeably lead to a truly indefinite stay of execution would be likely to render the individual incompetent to be executed under *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Ford*.

ARGUMENT

I. DISTRICT COURTS HAVE DISCRETION TO STAY A FIRST FEDERAL HABEAS PROCEEDING WHILE A HABEAS PETITIONER LACKS COMPETENCE BECAUSE OF MENTAL ILLNESS OR DISABILITY

District courts generally have discretionary authority to stay proceedings before them for any number of potential reasons. *See Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936) (Cardozo, J.) (observing that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket"). This Court has recognized that this general principle applies to federal habeas review of state convictions and that discretionary stay authority remains an inherent power of the federal courts in the post-conviction context. *See Rhines v. Weber*, 544 U.S. 269, 276 (2005) (holding that "AEDPA does not deprive district courts of th[e] authority" recognized in *Landis*, though "it does circumscribe their discretion"). Although petitioners and the United States urge this Court to craft and impose strict limits on district court authority to issue stays based on a habeas petitioner's lack of competence resulting from a mental disorder or disability, none of them appears to dispute (at the level of principle) that district courts have authority to impose a stay under sufficiently compelling circumstances.[2]

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[2] *See* Ryan Br. 20-21 ("Some rare circumstances might justify a federal district court's *limited* stay based on the inmate's alleged incompetence."); Tibbals Br. 31 (stating that a district court could impose "a limited stay [that] advances an important objective . . . while imposing minimum delay"); U.S. Br. 29 ("In [certain] circumstances, AEDPA would not necessarily foreclose a stay for a limited period to afford the prisoner the opportunity to regain his competence (on his own or with medication).").

That general discretion is also supported by traditional understandings of procedural fairness and judicial integrity in capital cases. As this Court recognized in *Ford*, one of the key justifications at common law for the requirement that an individual be competent at the time of execution was the inability of an individual lacking such competence to give reasons why he should not be executed. *See Ford*, 477 U.S. at 407 (quoting, among others, Blackstone: "[I]f, after judgment, [the prisoner] becomes of non-sane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.");[3] Carter Br. 19-20 (collecting additional quotations from Blackstone, Hawles, and Hale).

The modern federal habeas process is designed to discourage (or to prevent outright) prisoners seeking review of their capital convictions from attempting to give such reasons only at the last minute. In particular, AEDPA channels review of post-conviction challenges first into the state courts (as the "main event," *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011) (internal quotation marks omitted)) and then into the first federal habeas petition, *see* 28 U.S.C. § 2244, with only a few "exceptions." *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007). This staged process presupposes that anything an individual might have to say to the state and federal courts can be said well before execution is imminent. *Cf. McCleskey v. Zant*,

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[3] The term "peradventure" indicates that Blackstone was referring not to any specific cause to believe that a prisoner could make any such allegation, but to a mere "possibility . . . ; uncertainty, [or] doubt." XI *The Oxford English Dictionary* 517 (2d ed. 1989).

499 U.S. 467, 492 (1991) (explaining that unnecessary "second or subsequent federal habeas petition[s]" give rise to a "[p]erpetual disrespect for the finality of convictions [that] disparages the entire criminal justice system").

Indeed, Justice Powell's concurrence in *Ford* argued that the Eighth Amendment standard for competence at the time of execution did not need to include the ability to raise legal or factual objections precisely because any such objections should already have been raised much earlier in the collateral-review process. Justice Powell noted that "[m]odern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal collateral review," and including "access to counsel, by constitutional right at trial, and by employment or appointment at other stages of the process whenever the defendant raises substantial claims," all of which made it "unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free." *Ford*, 477 U.S. at 420 (Powell, J., concurring in part and concurring in the judgment).[4]

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[4] *See also Ford*, 477 U.S. at 420 n.2 (Powell, J., concurring in part and concurring in the judgment) (arguing that a standard that required a defendant to be competent to assist counsel at the time of execution would give too little weight to "States' . . . strong and legitimate interest in avoiding repetitive collateral review through procedural bars"). Petitioner Ryan argues that Justice Powell's opinion in *Ford* weighs against considering competence to assist counsel at the time of post-conviction proceedings because taking that factor into account would "negate the *Ford* standard," which does not require such competence at the time of execution. Ryan Br. 17-18. That argument lacks force if (as appears) Justice Powell found such a requirement

This reasoning presumes that a prisoner who is to be executed has previously had access to the state and federal processes available for raising factual and legal challenges to his conviction and death sentence.[5] After AEDPA, those opportunities still include the "opportunity for . . . federal review" of constitutional challenges to a state conviction, and this Court has recognized the "gravity of th[e] problem" posed for the federal courts when a petitioner "ha[s] no way of controlling" whether such review will occur. *Rhines*, 544 U.S. at 275.[6] To make that opportunity fair and meaningful, federal district courts must retain the ability to stay their proceedings when, because of a prisoner's lack of competence, going forward would render a federal habeas petition a hollow exercise as to important claims.

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unnecessary based on his assumption that fair and reliable post-conviction proceedings had already by that point occurred.

[5] *See* Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1178 (2005) (observing that "Justice Powell must have been assuming that prisoners on the threshold of execution have already taken advantage of . . . post-conviction opportunities," but that such an assumption is "warranted . . . only if a prisoner's impaired capacity to assist in post-conviction litigation would have been identified during the post-conviction proceedings" and would have "le[d] the courts to take appropriate precautionary action").

[6] *See Panetti*, 551 U.S. at 946 (explaining that the Court has "resisted an interpretation of [AEDPA] that would 'produce troublesome results,' 'create procedural anomalies,' and 'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent'") (quoting *Castro v. United States*, 540 U.S. 375, 380-81 (2003)); *cf. Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (explaining that a "*first* federal habeas petition" embodies the traditional "protections of the Great Writ").

II. A STAY IS APPROPRIATE WHEN NECESSARY TO ENSURE A FAIR RESOLUTION OF SPECIFIC CLAIMS BEARING ON THE VALIDITY OF A CONVICTION OR DEATH SENTENCE

In 2005, APA adopted a position statement entitled Mentally Ill Prisoners on Death Row. As most relevant to this case, the statement proposes the following standard:

> If a court finds at any time that a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings.

Add. 2.[7] APA's position statement was based on the work of a Task Force on Mental Disability and the Death Penalty,[8] formed by ABA in 2003. *See*

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[7] A copy of APA's position statement is attached to this brief as an Addendum. The statement goes on to say that, "[i]f the court finds that there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future, it should reduce the prisoner's sentence to a lesser punishment." Add. 2. Whether and under what circumstances a federal habeas court can order a sentence reduction on this basis are questions not presented by the present cases.

[8] The Task Force was composed of "professionals knowledgeable in law, psychology, and psychiatry, some of whom [we]re advocates for people with mental disability." Ronald J. Tabak, *Overview of Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1123, 1123 (2005).

ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006) ("Task Force Report"). The Task Force's recommendation was adopted not only by APA, but also by ABA, by the American Psychological Association, and by the National Alliance for the Mentally Ill (now known as the National Alliance on Mental Illness). *See id.*

The proposed standard is intended to reflect a balancing of the concerns that apply when competence is assessed in the post-conviction setting, as distinct from those that apply when a defendant's competence to stand trial is in question. It acknowledges that, because a prisoner seeking habeas review of a capital sentence is already the subject of a "presumptively valid" conviction, *Daniels v. United States*, 532 U.S. 374, 382 (2001), it would not be appropriate to forestall the state from executing its sentence without "a substantial and particularized showing that the prisoner's impairment would prevent a fair and accurate resolution of specific claims." Task Force Report 674. The Task Force also made clear, moreover, that "[m]any issues raised in collateral proceedings can be adjudicated without the prisoner's participation, and these matters should be litigated according to customary practice." *Id.*

At the same time, "[t]horough post-conviction review of the legality of death sentences has become an integral component of modern death penalty law," so that "[a]ny impediment to thorough collateral review undermines the integrity of the review process and therefore of the death sentence itself." *Id.* As the Task Force further explained, "this rule 'rests less on sympathy for the sentenced convict than on concern

for the integrity of the criminal justice system,'" especially in light of the "[s]cores of people on death row [who] have been exonerated based on claims of factual innocence, and [the] many more offenders [who] have been removed from death row and given sentences less than death because of subsequent discovery of mitigating evidence." *Id.* at 674-75 (quoting ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 291 (1989) (commentary to Standard 7-5.6)).

In leaving the stay decision within the discretion of the district court, moreover, this Court can provide guidance that its resolution should take into account both "AEDPA's objective of encouraging finality" and the statute's "goal of streamlining federal habeas proceedings." *Rhines*, 544 U.S. at 277. These concerns can and should be part of the determination whether, on the facts of a particular case, a prisoner's participation is necessary for a fair resolution of specific claims identified by his counsel during the period that the prisoner lacks competence. *Cf. Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007) (explaining that AEDPA has not changed the "basic rule" that "the decision to grant an evidentiary hearing [is] generally left to the sound discretion of district courts," but those courts must "take into account [AEDPA's] standards" in making their decisions). These policies can best be weighed against the loss of the petitioner's personal participation on the case after a careful "appraisal of the facts by the court whose function it is to exercise discretion." *Landis*, 299 U.S. at 258.[9]

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[9] Petitioner Ryan urges that the Court should permit stays only when the claim that a habeas petition cannot press for lack of competence involves an "assertion of actual innocence." Ryan Br. 20-21 (citing *House v. Bell*, 547 U.S. 518 (2006), and *Schlup*

III. FORENSIC EXAMINERS CAN PROVIDE USEFUL INFORMATION TO SUPPORT JUDICIAL DECISIONS IN POST-CONVICTION PROCEEDINGS

The ultimate determination whether a capital habeas case should be stayed on the basis of a prisoner's lack of competence to assist counsel will necessarily be judicial, not medical, in character. That discretion should nevertheless be informed and guided by the judgment of medical professionals for its proper exercise. The types of assistance that such professionals would likely provide, and the tools that they would use to provide that assistance, may inform the Court's decision in this case. These types of assistance would include assessing an individual's ability to assist counsel; detecting individuals who are or may be feigning symptoms in order to delay the legal process; and providing information about the likelihood that an individual who presently lacks the ability to assist counsel will gain or recover that ability within a reasonable time.

In considering the importance of the information that forensic psychiatrists can provide, and the appropriate response to that information by the district

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v. Delo, 513 U.S. 298 (1995)). This suggestion lacks merit because the purpose of the actual-innocence standard that this Court adopted in *House* and *Schlup* is to identify the rare case in which a prisoner has committed a procedural default without cause or has abused the writ, yet the federal courts should nevertheless overlook the prisoner's procedural error in order to avoid a miscarriage of justice. *See House*, 547 U.S. at 536. A prisoner in respondents' position, however, has not triggered a procedural bar, but has (through counsel) sought timely relief based on a temporary inability to invoke the writ's protections in the first instance. That situation is not comparable to the ones this Court addressed in *House* and *Schlup*.

courts, the Court should bear in mind that serious mental disorders, including schizophrenia and bipolar disorder, can interfere with the ability to assist counsel in a variety of ways. Delusion ideation in particular may lead a prisoner to misconstrue his situation.[10] Driven by paranoid ideation, a prisoner might conclude that his attorney is in fact conspiring against him and cannot be trusted;[11] or, under the influence of a grandiose delusion, he may believe that, because he is God's agent on earth, he cannot be harmed and will be released, and therefore an appeal need not be pursued.[12] Hallucinatory voices may warn the prisoner against cooperating with his

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[10] *See generally* APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 299 (4th ed. Text Revision 2000) ("DSM-IV-TR") (describing different types of delusions associated with schizophrenia); Bruce G. Link et al., *Real in Their Consequence.: A Sociological Approach to Understanding the Association between Psychotic Symptoms and Violence*, 64 AM. SOC. REV. 316, 316 (1999) (proposing that "people's definitions of situations shape their behavior" and so have real consequences, even when those definitions are delusional).

[11] *See, e.g.*, Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. AM. ACAD. PSYCHIATRY & L. S3, S49 (Supp. 2007) (advising that it is appropriate to include a diagnosis of "paranoid schizophrenia" in a forensic report in order to make clear that a defendant's refusal to "cooperate with his attorney because he irrationally perceives the attorney as plotting against him . . . stem[s] from a well-known form of mental illness and not from quirkiness or unwillingness to cooperate").

[12] *See, e.g.*, Jennifer L. Kunst, *Understanding the Religious Ideation of Forensically Committed Patients*, 36 PSYCHOTHERAPY 287, 294 (1999) (explaining that "[p]atients who believe they are God or will be miraculously saved do not have the felt need to grapple with their real-life situation" and "rarely settle into the difficult task of dealing with the reality of their incarceration").

attorney or threaten him with harm if he does so.[13] The confusion associated with psychosis itself, the result of a tumultuous mixture of delusional perceptions and hallucinatory stimuli, can leave the prisoner unable to attend to his legal situation or to communicate coherently with legal counsel.[14]

A. Assessing an Individual's Ability To Participate in the Legal Process

The assessment of an individual's ability to participate in the legal process is a well-established part of forensic psychiatric practice that has been studied and discussed extensively in professional literature.[15] This study has so far largely occurred in the context of competence to stand trial, which is a different *legal* situation from competence to assist counsel with pursuing post-conviction remedies. The *medical* issues that arise in the two contexts nevertheless overlap

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[13] *See generally* DSM-IV-TR 313-14 (identifying "prominent delusions or auditory hallucinations" as one "essential feature" of paranoid schizophrenia); *cf.* Carter Br. 3 (noting statements in record concerning Carter's hallucinations).

[14] *Cf. Ford*, 477 U.S. at 403 ("[I]n an interview with his attorneys, Ford regressed . . . into nearly complete incomprehensibility, speaking only in a code characterized by intermittent use of the word 'one,' making statements such as 'Hands one, face one. Mafia one. God one, father one, Pope one. Pope one. Leader one.'").

[15] *See, e.g.*, GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS § 6.05, at 141 (3d ed. 2007) ("PSYCHOLOGICAL EVALUATIONS") ("Since 1970, a substantial literature has developed about the nature of the competency evaluation."); Gianni Pirelli et al., *A Meta-Analytic Review of Competency to Stand Trial Research*, 17 PSYCHOL. PUB. POL'Y & L. 1, 3 (2011) ("*Competency Research Review*") (noting that "hundreds of articles and numerous books have been published since the 1960s aimed at developing and refining practice standards in the competency arena").

considerably, so existing studies provide useful information about the types of information that medical practitioners can provide to district courts.

Forensic mental health professionals use a range of different approaches when assessing competence. Competence assessments were historically made on the basis of relatively unstructured interviews, and some still are.[16] A growing number of assessments now rely on more structured methods, however, including systematic clinical evaluations,[17] general protocols that are used in both forensic and non-forensic contexts, and specialized protocols such as the MacArthur Competence Assessment Tool – Criminal Adjudication ("MacCAT-CA") and Evaluation of Competence to Stand Trial – Revised ("ECST-R") that have been developed specifically for use in criminal proceedings.[18]

The MacCAT-CA and ECST-R evaluations each consist of a series of standardized items that are designed to test the subject's ability to understand the legal system on both a factual and a rational level,

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[16] *See* PSYCHOLOGICAL EVALUATIONS § 6.06(b), at 147; Robert P. Archer et al., *A Survey of Psychological Test Use Patterns Among Forensic Psychologists*, 87 J. PERSONALITY ASSESSMENT 84, 91-92 (2006) ("*Psychological Test Use*").

[17] *See* PAUL S. APPELBAUM & THOMAS G. GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 239-41 (4th ed. 2007) (describing a structured process for evaluating a patient's competence to stand trial).

[18] *See Competency Research Review* 3-4; *Psychological Test Use* 87, 89 & tbl. 9; *see also id.* at 92 (discussing the "marked and continuing popularity of traditional clinical assessment instruments in forensic evaluations," and the "increasing popularity of specialized assessment forensic instruments," though also noting that some "traditional assessment practices are retained in the absence of empirical support").

and to provide assistance to counsel in defending the subject's case.[19] Both were designed to shed light on the factors set forth by this Court in *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam), and were tested in multiple studies.[20] Other protocols perform more specialized functions. For example, the Competency Screening Test is intended not to provide a comprehensive evaluation of an individual's competency to stand trial but instead to "screen" for individuals who appear likely to be of questionable competency and therefore would benefit from a more comprehensive evaluation.[21]

The reliability and quality of competence testing are difficult to demonstrate empirically because the practitioners' findings are ultimately used as an input to a judicial decision, and there is no external means to determine whether the medical information helped the judge rule correctly.[22] Nevertheless, some light can be shed on the issue by comparing different experts' assessment of the same individuals. A recent study using statistical techniques to conduct such a comparison estimated that participating experts could "correctly distinguish a randomly selected competent defendant from a randomly selected incompetent

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[19] *See* PSYCHOLOGICAL EVALUATIONS § 6.06(c)(1), at 149-52 (MacCAT-CA); *id.* § 6.06(c)(2), at 152-54 (ECST-R).

[20] *See id.* § 6.06(c)(1), (2), at 149, 153.

[21] *See id.* § 6.06(a)(1), at 146.

[22] *See* Douglas Mossman et al., *Quantifying the Accuracy of Forensic Examiners in the Absence of a "Gold Standard,"* 34 LAW & HUM. BEHAV. 402, 403 (2010) (discussing the difficulty of determining "how accurate [competency] judgments are" in light of the absence of a "gold standard to establish absolute truth in any particular case").

defendant in 29 out of 30 attempts."[23] Other studies have similarly found that experts tend to reach the same results when assessing the same individuals, which suggests that the criteria they are applying are at least objective and consistent.[24] Other studies have found that only about one-quarter of criminal defendants who are referred for a competency assessment are found to lack competence to stand trial,[25] which suggests that medical evaluations serve as a meaningful check on such claims.

B. Tools for Detecting Malingering

One question of particular concern to practitioners and courts in connection with forensic assessments of mental illness has been the risk that defendants or prisoners who are undergoing assessment for competence may inappropriately delay or even avoid legal proceedings by malingering – that is, by the "intentional production of falsely or grossly exaggerated . . . psychological symptoms, motivated by external incentives." DSM-IV-TR 739.

The threat of punishment in the case of a criminal defendant before trial, or of execution in the case of a prisoner who has been sentenced to death, can

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[23] *Id.* at 409. The study's authors did, however, indicate that more research would be needed to improve the "generalizability of [their] conclusion" and that in the interim it should be "viewed with caution." *Id.* at 402, 412.

[24] *See* PSYCHOLOGICAL EVALUATIONS § 6.05(c), at 145 ("[E]valuations of competency to stand trial [are] usually highly reliable and potentially highly valid, [and] these levels of psychometric rigor can be achieved in a relatively brief interview.").

[25] *Competency Research Review* 28 (after reviewing a large number of quantitative studies, estimating the "base rate of incompetency" among defendants referred for evaluation at 27.5%).

provide an obvious incentive to present false or exaggerated symptoms of a mental disorder or defect. Although neither petitioner in this case discusses malingering extensively, both argue that this Court should constrain or eliminate district courts' ability to stay habeas proceedings for lack of competence to proceed based in part on concerns that prisoners will deliberately delay such proceedings. *See* Ryan Br. 19; Tibbals Br. 28. Similarly, several states contend as *amici* that prisoners will likely raise "frivolous . . . challenge[s]" to competence because it "costs [a habeas] petitioner nothing" to do so. Utah et al. Br. 5.

In evaluating these concerns, the Court should take into account the substantial amount of professional effort that has gone into ensuring that forensic psychiatrists are able to provide the courts with objective evidence about whether a particular individual's symptoms are real or feigned.[26] A number of instruments are available to assess whether an individual is feigning mental disorder or disability. The ECST-R, for example, includes a section that is "designed specifically to assess feigned incompetency."[27]

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[26] *See, e.g.*, Randy K. Otto, *Challenges and Advances in Assessment of Response Style in Forensic Examination Contexts* ("*Challenges and Advances*"), *in* CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION 365, 375 (Richard Rogers ed., 3d ed. 2008) (stating that "considerable gains" have been made "in the understanding and assessment of response style" – a term that includes the detection of malingering). The author indeed argues that forensic mental health professionals have placed *too* much emphasis on malingering and that the field should shift towards a broader understanding of response styles that takes into account other ways in which examinees' responses may not present an accurate picture of their condition. *See id.* at 366.

[27] Michael J. Vitacco et al., *An Evaluation of Malingering Screens with Competency to Stand Trial Patients: A Known-Groups Comparison*, 31 LAW & HUM. BEHAV. 249, 250-51 (2007);

There are also a number of specialized instruments designed specifically to assess the possibility of malingering or otherwise feigned symptoms.[28] These issues have been the focus of considerable research in the last 15 years, and the instruments available can be expected to improve over time.

In light of the information that forensic practitioners can provide to district courts on this issue, APA and AAPL do not believe that the concerns advanced by petitioners justify eliminating or categorically restricting district courts' discretion to stay a habeas case based on a finding that a particular prisoner suffers from a mental disorder or disability that prevents the court from fairly resolving his claims. Instead, district courts should have discretion to deal with such problems on a case-by-case basis.

IV. CONCERNS ABOUT LONG-TERM DELAY DO NOT JUSTIFY CATEGORICAL RESTRICTIONS ON JUDICIAL DISCRETION

Another concern that petitioners and their *amici* press is the risk that allowing district courts broad discretion in staying federal habeas proceedings on competence grounds will lead to long-term delays that are inconsistent with the purposes of AEDPA. *See* Ryan Br. 19 (expressing concern that a prisoner could "stay [federal habeas] proceedings . . . indefinitely if the inmate is found to be incompetent to assist counsel"); Tibbals Br. 29 (warning that discretionary stay authority would be a "mechanism for

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see id. at 258 (finding that the ECST-R is "generally effective at identifying possible cases of malingering").

[28] *See id.* at 252-53 (describing different tests that can be used to detect malingering, of varying length, complexity, and effectiveness); *see also Challenges and Advances* 370-72 (discussing additional tests).

capital prisoners to forestall – and in many cases, frustrate – a State's enforcement of its criminal judgments"); U.S. Br. 27 (arguing that an "indefinite stay issued solely in the hope that the prisoner might some day regain competence" is inconsistent with AEDPA's purposes).[29]

As an initial matter, petitioners offer no evidence to support their suggestion that this problem will arise in "many cases." Tibbals Br. 29. In the pre-trial context, most defendants who are found to lack competence to stand trial recover such competence within a finite period of time.[30] Although it is not clear whether these results can reliably be generalized to include capital prisoners in post-conviction proceedings, as many factors may differ between the two populations, they nevertheless provide a useful benchmark for evaluating issues related to possible restoration of competence.

Petitioner Ryan and the United States argue, however, that stays based on lack of competence will lead to delay because capital petitioners lack an "'incentive to obtain federal relief as soon as possible.'"

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[29] APA and AAPL take the view as a policy matter, as did the Task Force, that, if a district court cannot fairly adjudicate a capital prisoner's habeas petition because of his lack of competence, and there is no reasonable likelihood the prisoner will become competent in the future, the appropriate result is an order reducing the capital sentence to a lesser punishment. *See supra* note 7 (noting that neither prisoner has requested such relief in this case).

[30] *See* PSYCHOLOGICAL EVALUATIONS tbl. 6.6, at 163 (in Florida from 2002 to 2004, 78.5% of defendants were restored to competence within 180 days, and 87.3% within 270 days); *see also id.* (in Michigan from 2002 to 2005, defendants stayed in a hospital for competence restoration an average of 134 days and a median of 100 days).

Ryan Br. 19 (quoting *Rhines*, 544 U.S. at 277-78); U.S. Br. 27 (same). These contentions rest on an implied assumption that the prisoners being discussed have the capacity to perceive their situation, assess their incentives, and behave strategically. In fact, however, the lack of that capacity may be precisely why the individuals are adjudicated incompetent. One textbook gives the real-life example of a pretrial defendant who held the "strong although highly delusional belief that he would go free regardless of the case outcome," because, as the defendant stated:

> "My real name is John Jones Jesus 2000. God has ordered that on January 1, 2000, I be ordained the chief religious order for the state of Florida in a ceremony on the steps of the capital in Tallahassee. If they try to interfere, God will kill all the white people, and they won't stand for that. They'll have to let me go."

PSYCHOLOGICAL EVALUATIONS § 6.06(c)(1), at 151. A capital prisoner holding similar delusional beliefs would be no more likely to delay proceedings intentionally than he would be to participate constructively in them. Indeed, the description in respondent Carter's brief of his "false belief that he could not be executed unless he volunteered," Carter Br. 9, suggests that he would be similarly nonresponsive to incentives in his case.[31]

Further, any threat that indefinite delay will harm legitimate state interests appears slight when

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[31] The members of APA and AAPL who have reviewed this brief have not evaluated respondents and cannot attest to their actual medical condition. The discussion above and on page 22 assumes that the descriptions of respondents' condition by their counsel are true solely for the purpose of illustrating the general points advanced in this brief.

one considers that a prisoner cannot ultimately be executed unless he meets the Eighth Amendment test for competence under *Ford* and *Panetti*. This is a practical argument, not a legal one: as a legal matter, the *Ford* test is distinguishable from the appropriate test for post-conviction proceedings. Nevertheless, it seems likely that many prisoners with mental disorders or disabilities sufficiently severe to render them permanently unable to assist their counsel in post-conviction proceedings would likewise prove unable to comprehend the reasons for their execution.

Taking examples from the present cases, respondent Gonzales's brief states that, at the time of his federal habeas proceedings, he "experienced continuing decline in his mental health," as a result of which he "no longer understood his legal situation, and particularly the impending sentence of death." Gonzales Br. 5. Respondent Carter's brief describes statements in the record that he has lost the ability "'to comprehend or respond to communications from others,'" or to "remember his trial [or] the penalty-phase verdict." Carter Br. 9. These descriptions at least raise significant questions whether these individuals "comprehend[] the meaning and purpose of the punishment to which [they] ha[ve] been sentenced," *Panetti*, 551 U.S. at 960, and therefore whether they could be constitutionally put to death without showing significant medical improvement.

As a result, the interests in finality and promptly executed sentences that petitioners stress so heavily may often be "empty formalit[ies]," *id.* at 946, of the sort this Court has disregarded in the past. The substantive question before the Court is instead: assuming that respondents recover some day to the point where they can understand their situation,

should the courts then permit them to resume their first federal habeas petitions at the point where they left off? Or should those petitions instead be litigated in respondents' effective absence, treating their own memories of what happened at their own trials as mere "missing piece[s] of evidence," Tibbals Br. 31, on which they have no special claim to rely? Nothing in AEDPA requires the latter answer, and concerns for the reliability and integrity of the courts' decision-making processes strongly argue in favor of the former. Accordingly, this Court should adhere to its teaching that it will not "close [its] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent," *Castro*, 540 U.S. at 381, and hold that the district courts have sufficient discretion to save the claims of capital prisoners such as respondents in these cases.

CONCLUSION

The judgments of the Sixth and Ninth Circuits should be affirmed.

Respectfully submitted,

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July 27, 2012

ADDENDUM

Add. 1

APA Official Actions

Position Statement on Mentally Ill Prisoners on Death Row

Approved by the Board of Trustees, December 2005

Approved by the Assembly, November 2005

"Policy documents are approved by the APA Assembly and Board of Trustees . . . These are . . . position statements that define APA official policy on specific subjects . . ." – *APA Operations Manual.*

(a) Grounds for Precluding Execution. A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forego or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case. Procedures to be followed in each of these categories of cases are specified in (b) through (d) below.

(b) Procedure in Cases Involving Prisoners Seeking to Forego or Terminate Post-Conviction Proceedings. If a court finds that a prisoner under sentence of death who wishes to forego or terminate post-conviction proceedings has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision,

the court should permit a next friend acting on the prisoner's behalf to initiate or pursue available remedies to set aside the conviction or death sentence.

(c) Procedure in Cases Involving Prisoners Unable to Assist Counsel in Post-Conviction Proceedings. If a court finds at any time that a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings. If the court finds that there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future, it should reduce the prisoner's sentence to a lesser punishment.

(d) Procedure in Cases Involving Prisoners Unable to Understand the Punishment or its Purpose. If, after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case, the sentence of death should be reduced to a lesser punishment.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Nos. 11-218 & 10-930

IN THE

Supreme Court of the United States

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Petitioner,

v.

ERNEST VALENCIA GONZALES,

Respondent.

TERRY TIBBALS, Warden,

Petitioner,

v.

SEAN CARTER,

Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Tenth Circuits

BRIEF OF RETIRED FEDERAL JUDGES AS *AMICI* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are a group of seven former federal circuit and district court judges who have substantial experience adjudicating habeas petitions and issues surrounding the competency of criminal defendants.[1] The attached Appendix contains a list of the *amici*, along with biographical information for each. *Amici* are interested in this case because of their years of dedicated service to the country and their commitment to its Constitution and laws.

Amici urge the Court to affirm the decisions below and to hold that a district court has the inherent authority to stay habeas proceedings if it determines that the inmate is incompetent and the inmate's assistance is essential to the presentation of the habeas claims.

SUMMARY OF ARGUMENT

All parties agree that a district court possesses the inherent authority to stay a federal habeas proceeding if it determines that the inmate is incompetent. Ryan Br. 20; Tibbals Br. 31; U.S. Br. 29-30; Gonzales Br. 1; Carter Br. 12. But Petitioners and the United States urge a narrow view of that authority. Arizona would limit district courts' authority to issue stays to habeas petitions raising a claim of actual innocence. Ryan Br. 20. Ohio, following the lead of the United States, advocates a broader approach but would still

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici* and their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All counsel of record for all parties have consented to the filing of this brief.

limit district courts' authority to issue stays to habeas proceedings where a fact-finding hearing is necessary. Tibbals Br. 31; U.S. Br. 29-30.

Those proposed limits on district courts' inherent authority are unjustified. The question of whether to stay *any* case – including a habeas proceeding – is a matter best left to the sound discretion of district courts. District courts already possess wide discretion in adjudicating claims of incompetence – and, where appropriate, issuing stays – in federal criminal trials and in habeas proceedings under *Ford v. Wainwright*. And they have exercised that discretion ably.

Here, therefore, the better rule is one that does not arbitrarily limit district courts' inherent authority to issue stays. Rather, the proper rule is the one adopted below: district courts should have the inherent authority to issue stays when a habeas petitioner's incompetence prevents communication with counsel and that communication is "essential" to the presentation of the petitioner's claims. *In re Gonzales*, 623 F.3d 1242, 1245 (9th Cir. 2010); *accord Carter v. Bradshaw*, 644 F.3d 329, 337 (6th Cir. 2011) (stay appropriate for all claims that "essentially require [the inmate's] assistance"). As Judge Posner put it, "[w]hatever the nature of the proceeding, the test [of whether to stay the proceeding on competency grounds] should be whether the defendant (petitioner, appellant, etc.) is competent to play whatever role in relation to his case is necessary to enable it to be adequately presented." *Holmes v. Buss*, 506 F.3d 576, 579 (7th Cir. 2007). That rule recognizes that there are a wide variety of scenarios in which a habeas petitioner's incompetence will stifle his counsel's ability to

adequately present his claims. And the rule properly places the question of whether to issue a stay in the sound discretion of the district court – discretion which, *amici* submit, district courts will continue to exercise wisely.

ARGUMENT

I. A District Court's Inherent Authority to Stay Habeas Proceedings Should Not Be Limited in the Manner Proposed by Petitioners and the United States.

District courts have the inherent authority to stay habeas proceedings "where such a stay would be a proper exercise of discretion." *Rhines v. Weber*, 544 U.S. 269, 276 (2005). "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket . . . . How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *accord Clinton v. Jones*, 520 U.S. 681, 706-07 (1997) (recognizing a district court's "broad discretion to stay proceedings"). Incompetency has long been recognized as a valid reason for staying criminal proceedings. *See Rees v. Peyton*, 384 U.S. 312, 313-14 (1966); 4 William Blackstone, *Commentaries* 25 (1769); 1 Sir Matthew Hale, *The History of the Pleas of the Crown* 35 (Prof'l Books Ltd. 1971) (1736) (pre-1676 manuscript), quoted in *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 807 (9th Cir. 2003).

Petitioners and the United States, however, would severely curtail district courts' discretion to stay habeas proceeding on competency grounds. Their pro-

posed rules are unjust. Were one of those rules adopted, there would be many situations in which an incompetent inmate would be unable to secure habeas relief despite having a meritorious claim.

Arizona argues that district courts' discretion to stay habeas proceedings should be limited to habeas petitions that assert actual innocence. Ryan Br. 20-21. That proposed rule must be rejected because, as even the United States concedes, there are many habeas claims in addition to actual innocence for which a habeas petitioner's participation is "crucial."[2] U.S. Br. 29. Frequently, therefore, Arizona's rule will prevent inmates from successfully presenting meritorious habeas claims because the inmate is incompetent. Arizona's rule is thus incompatible with the central function of habeas in ensuring that criminal punishment is meted out in accord with the laws of the United States.

The clearest examples of meritorious habeas claims that could not be brought without a competent inmate's assistance arise from habeas petitions asserting ineffective assistance of counsel. That is because ineffective-assistance claims regularly require

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[2] Even Respondent Tibbals apparently would not limit stays to cases of actual innocence. Rather, like the United States, Ohio appears to take the view that in cases involving factfinding where "the prisoner's participation is essential to a dispositive evidentiary question," the court "might stay its proceedings 'to afford the prisoner the opportunity to regain his competence (either naturally or through medication).'" Tibbals Br. 31 (quoting U.S. Br. 16). As discussed below, this standard wrongly limits stays to only those habeas proceedings in which on-the-record fact-finding will occur.

the habeas court to conduct "additional factual development" beyond the cold trial record:

> The evidence introduced at trial . . . [is] devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. . . . The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them.

Massaro v. United States, 538 U.S. 500, 505 (2003). Thus, an inmate's input can be crucial in presenting ineffective-assistance claims; it is often necessary for an inmate to assist counsel in uncovering and establishing the "additional factual development," *id.*, necessary to litigate the claim. Consider these examples:

- In *Hollis v. United States*, 687 F.2d 257 (8th Cir. 1982), habeas relief was granted on the ground that trial counsel had been ineffective in failing to appeal a conviction. Critical to the court's decision to grant the writ was the inmate's testimony that he "informed his attorney of his wish to appeal his sentence" and the attorney ignored it. *Id.* at 259. Had the inmate been incompetent and unable to testify, the court may have denied habeas relief on

the ground that the inmate had intentionally waived his right to appeal.

- In *United States v. Harris*, 408 F.3d 186 (5th Cir. 2005), habeas relief was granted on the ground that trial counsel had been ineffective in refusing to allow the inmate to testify at trial. The trial transcript revealed that the inmate's counsel had asked him in open court whether he wished to testify and the inmate had said no. But in granting habeas relief, the court credited the testimony of the inmate at a habeas hearing that the inmate had "told his lawyer that he wanted to testify, but was told, '[n]o, there is no need. We've got this case won.'" *Id.* at 192 (brackets in original). Had the inmate been incompetent and incapable of testifying in the habeas hearing, the court would have been presented only with trial transcript showing that the inmate had declined to testify. The court never would have learned that the inmate's statement on the record came only after counsel had impermissibly refused his request to testify.

- In *United States v. Grant*, 446 F. App'x 473 (3d Cir. 2011), habeas relief was granted on the ground that trial counsel had been ineffective in failing to advise the inmate that he would be sentenced as a career offender if he pleaded guilty. One way that the inmate established that the ineffective assistance caused him prejudice was by testifying that he would have gone to trial had he known that he would be sentenced as a career offender. Plainly, that testimony would not have been available if the inmate had been incompe-

tent. Nor could an incompetent inmate have informed the court of what trial counsel had advised.

Although they provide many of the clearest examples, ineffective-assistance claims are not the only types of habeas claims for which an inmate's participation is crucial. There are many other circumstances in which a meritorious habeas claim can be brought only when the inmate is sufficiently lucid to assist his counsel. Indeed, as the United States recognizes (U.S. Br. 29), even after the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, there are circumstances under which a state prisoner is entitled to an evidentiary hearing. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1400-01 (2011). And federal prisoners are routinely entitled to evidentiary hearings in proceedings brought under 28 U.S.C. § 2255. *See, e.g.*, *Massaro*, 538 U.S. at 505; *see also* U.S. Br. 29. An inmate's participation may be a critical to preparing for and conducting such an evidentiary hearing.

For instance, an inmate's testimony at a habeas hearing has often been the key to the successful presentation of a habeas claim. *See, e.g.*, *Pearce v. Cox*, 354 F.2d 884, 902 (10th Cir. 1965) (an inmate's testimony demonstrated that his guilty plea was not voluntarily entered). In *Tibbals*, for example, were the inmate competent, he could provide his own account of his "experiences, thoughts, and capacities of perception" at the time of his trial – bolstering his claim that he was incompetent to be tried. Carter Br. 32.

Even where an inmate does not testify himself, he still may assist his counsel in identifying witnesses

and other evidence for a habeas hearing. Consider, for example, habeas claims asserting a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* claims often require habeas counsel to present detailed evidence outside the trial record, and an inmate may provide insight into how to present that evidence. The inmate himself may identify the witnesses or other evidence necessary to establish a *Brady* violation. *Cf. Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) ("prima facie case of a *Brady* violation" established by declarations made by fellow inmate and prison warden); *Graves v. Cockrell*, 351 F.3d 143 (5th Cir. 2003) (successive habeas petition asserting *Brady* violation allowed to proceed where the prosecutor disclosed the existence of exculpatory evidence in a "media interview"). Or the inmate may corroborate or provide context to improperly withheld evidence, assisting his attorneys in showing that the *Brady* violation was material. *Cf. Monroe v. Angelone*, 323 F.3d 286, 298-317 (4th Cir. 2003) (habeas relief granted for *Brady* violation after court undertook detailed analysis of ten pieces of previously undisclosed exculpatory evidence). In either case, a meritorious *Brady* claim involving additional fact-finding may go unrecognized where an incompetent inmate is unable to assist his counsel. The rule urged by Arizona therefore should be rejected.

So too should Ohio's proposed rule be rejected. Ohio, following the views expressed by the United States, contends that a district court has no equitable discretion to grant a stay in a habeas proceeding that will not involve "an evidentiary hearing." Tibbals Br. 31; U.S. Br. 29-30. That view, while not as constricted as Arizona's, is still flawed. A habeas peti-

tioner may have critical information to offer his counsel even where his habeas proceedings will not encompass further on-the-record fact-finding. The facts of *Ryan* provide a useful example. Respondent Gonzales was *pro se* for part of his criminal trial, and ultimately had eleven different lawyers over the course of his trial and sentencing. In that situation, Gonzales is by far the best-situated person to provide his habeas counsel with a complete account of what occurred at the trial, including his allegations of judicial bias. *Cf. Holmes*, 506 F.3d at 580 ("The petitioner was at his trial; his current lawyers were not. He may—if mentally competent—be able to convey to his lawyers a better sense of the alleged misbehavior of the prosecutor and of defense counsel than the trial transcript and other documentation provide."). To be sure, the precise facts of Gonzales's case may not often be replicated, but they are illustrative of the variety of unpredictable scenarios district courts may be presented with. There is no reason to strip district courts of the discretion to enter stays in such situations where they are warranted.

II. District Courts Will Ably Exercise Their Inherent Authority to Issue Stays.

The rules advocated by Petitioners and the United States appear motivated by a concern that district courts lack the ability and knowledge to adjudicate stay motions. Petitioners fear that district courts will accede to the "dilatory tactics" of inmates feigning incompetency, *see* Ryan Br. 19; Tibbals Br. 28, and the United States worries that district courts will issue "indefinite stays" that needlessly prolong collateral review, *see* U.S. Br. 30.

But as *amici* know from first-hand experience, the concerns of Petitioners and the United States are unfounded. In reality, district courts will exercise their discretion to issue stays prudently. District courts are unlikely to be fooled by feigned incompetency; courts will deny frivolous incompetency claims at the earliest possible point; and courts will revisit indefinite stay orders to ensure that they are still needed.

This Court can be assured that district courts will exercise their inherent authority competently because district courts already possess considerable experience with incompetency claims. District courts routinely adjudicate claims of incompetency brought by federal criminal defendants facing trial and by former federal prisoners serving a term of supervised release. *See* 18 U.S.C. § 4241(a). And district courts regularly determine whether capital inmates (in both state and federal penitentiaries) meet the minimum standards of competency required for executions. *See Ford v. Wainwright*, 477 U.S. 399 (1986). District courts have amassed considerable practical experience in deciding incompetency claims in those settings, and courts use that experience to manage claims of incompetency in the habeas context.

A. District Courts Have Little Difficulty Detecting Feigned Incompetency.

Petitioners argue that were the decisions below upheld, "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the death sentence." Ryan Br. 19 (quotation marks omitted); *see also* Tibbals Br. 28. But for such "dilatory tactics" to succeed, habeas petitioners would have to feign incompetency. As *amici*

can attest, district courts are unlikely to be fooled by false incompetency claims.

Criminal defendants have feigned incompetency for hundreds of years, and for just as long, courts have successfully identified these charlatans. *See Cooper v. Oklahoma*, 517 U.S. 348, 365-66 (1996) (citing sources). As Sir John Hawles, Solicitor-General to King William III, remarked, "there is a great difference between pretences and realities, and *sana* and *non sana memoria* hath been often tryed in capital matters, and the prisoners have reaped so little benefit by their pretences, it being always discovered, that we rarely hear of it." John Hawles, *Remarks on the Trial of Mr. Charles Bateman* (1685), 11 How. St. Tr. 474, 478 (1816), *quoted in Cooper*, 517 U.S. at 365. So too today – neither Petitioners nor the United States have cited a single case in which a criminal defendant successfully fooled medical professionals and the court into concluding (incorrectly) that he was incompetent.

That is because district courts cut through feigned incompetency by carefully scrutinizing the evidence submitted in support of the claim. District courts also order psychological evaluations in which experts evaluate the inmate. *See* 18 U.S.C. § 4241(b). As this Court has recognized, "it is unusual for even the most artful malingerer to feign incompetence successfully for a period of time while under professional care." *Cooper*, 517 U.S. at 365. Thus, just as district courts are rarely fooled by criminal defendants falsely claiming incompetency to avoid trial – or capital inmates falsely claiming incompetency in *Ford* hearings to forestall their executions – courts are unlikely to be

fooled by inmates feigning incompetency to drag out habeas proceedings.

B. District Courts Will Deny Meritless Stay Motions at the Earliest Possible Stage.

Another reason that "dilatory tactics," Ryan Br. 19, are unlikely to succeed is that district courts are practiced in denying stay motions at the earliest possible point in the proceedings. A motion to stay proceedings on incompetency grounds presents several opportunities for district courts to weed out frivolous claims early.

First, when an inmate moves for a stay, a district court need not even order a medical evaluation where it finds that there is no basis for doing so. *See, e.g.*, *United States v. Smith*, 348 F. App'x 636, 637 (2d Cir. 2009); *United States v. Williams*, 998 F.2d 258, 262-63 (5th Cir. 1993).

Second, even when a district court orders a medical examination, the court need not hold an evidentiary hearing. Rather, district courts may, in their discretion, make competency determinations solely on the basis of a psychiatric report. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007); *United States v. Thompson*, 528 F.3d 110, 121-22 (2d Cir. 2008). In practice, evidentiary hearings on competency issues are regularly denied where the psychiatric report shows little sign of severe mental deficiencies.

Third, in those cases where the evidence of incompetency is sufficient to warrant an evidentiary hearing, district courts will issue stays only in those cases where they are truly warranted. District courts will likely require the inmate's attorneys to demonstrate

his incompetence by a preponderance of the evidence. *Cf.* 18 U.S.C. § 4241(d); *Cooper*, 517 U.S. at 362. And as scholars have recognized, only a small minority of incompetence claims succeed in practice. *See* Virginia Aldige Hiday & Padraic J. Burns, *Mental Illness and the Criminal Justice System, in A Handbook For the Study of Mental Health* 478, 490 (Teresa L. Scheid & Tony N. Brown eds., 2d ed. 2010).[3]

Thus, as *amici* know by experience, the notion that frivolous incompetency claims will inevitably delay habeas proceedings, *see* Ryan Br. 19; Tibbals Br. 28, is simply wrong. District courts are able to weed out frivolous incompetency claims without undue expense or delay, denying the weakest claims without a medical examination or on the basis of a written psychiatric report. When incompetency claims have sufficient support to warrant an evidentiary hearing, district courts weigh the evidence carefully and grant a stay only when necessary. Petitioners' fears of "dilatory tactics," Ryan Br. 19, are therefore illusory.

C. District Courts Will Revisit Stay Orders When Appropriate.

The United States argues that district courts should be denied the authority to issue "indefinite stays." U.S. Br. 30; *see also* Tibbals Br. 27-32. But that position is contradictory. The United States recognizes that stays are sometimes warranted to prevent the injustice of adjudicating habeas claims while

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[3] *Available at* http://hmid.basijmed.ir/public/hmid/books/mental%20health/A_Handbook_for_the_Study_of_Mental_Health__Social_Contexts__Theories__and_Systems___2nd_edition.pdf.

the petitioner is incompetent. U.S. Br. 29-30. If time passes and the inmate remains incompetent, the injustice does not wane. Arbitrarily ending an existing stay is just as unjust as refusing to grant a stay in the first place. Thus, district courts' inherent authority to stay habeas proceedings should not be constrained by arbitrary limits on a stay's duration. As *amici* know, district courts do not issue stays lightly, and courts revisit stay orders as appropriate.

When a district court makes a finding of incompetence, the common practice is to issue a stay of moderate duration – typically "not to exceed four months," 18 U.S.C. § 4241(d)(1) – in order to "determine whether there is a substantial probability that in the foreseeable future [the incompetent inmate] will attain the capacity to permit the proceedings to go forward," *id.* Thus, district courts do not rush to issue "indefinite stays"; they first take care to determine whether a limited stay is appropriate to restore the inmate to competency.

In addition, district courts may order that an inmate be medicated with antipsychotic drugs in an effort to restore the inmate to competency. *See Sell v. United States*, 539 U.S. 166, 169 (2003). Thus, "indefinite stays" are necessary only when an inmate's mental infirmities are so profound that he is beyond the reach of modern medicine – and only a very limited number of cases fall into that category.

Last, even if an inmate is so incompetent that a district court must issue a stay that does not recite a definite end point, there is every reason to believe that district courts will revisit the stay order periodically, inquiring about the status of the inmate and

testing whether the stay is still necessary. That is precisely the approach that this Court took in *Rees v. Peyton*, 386 U.S. 989 (1967). This Court exercised its inherent authority to stay Rees's habeas proceedings "until further order of the Court" – that is, indefinitely. *Id.* at 989; *see also Anderson v. Kentucky*, 376 U.S. 940 (1964) (staying a direct appeal on competency grounds "indefinitely"). This Court then periodically inquired into Rees's status. *See Rees v. Superintendant of Va. St. Penitentiary*, 516 U.S. 802 (1995). In the rare case in which that kind of stay is required, courts will not neglect their duty to ensure that the stay is as limited as possible under the circumstances. *See, e.g., Carter*, 644 F.3d at 337.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the decisions below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECOR
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In The
Supreme Court of the United States

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Petitioner,

vs.

ERNEST VALENCIA GONZALES,

Respondent.

TERRY TIBBALS, Warden,

Petitioner,

vs.

SEAN CARTER,

Respondent.

On Writs Of Certiorari To The United States Courts Of Appeals For The Sixth And Ninth Circuits

BRIEF OF UTAH, ALABAMA, ARKANSAS, COLORADO, DELAWARE, GEORGIA, NEVADA, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, WASHINGTON, WYOMING, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The States have compelling sovereign interests in the finality of their criminal judgments, their power to punish offenders, and their good faith efforts to enforce constitutional rights. *See, e.g.*, *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011). The decisions below improperly undermine those interests. They allow a death-sentenced petitioner to postpone, perhaps forever, the final disposition of a federal court's review of a State's death sentence.

SUMMARY OF ARGUMENT

The Ninth and Sixth Circuits permit an indefinite, perhaps permanent, federal stay of execution of a state death sentence even though no court has found the sentence to be unconstitutional. Both created this remedy based on a perceived statutory right to be competent to proceed in federal habeas review. As Arizona and Ohio have shown, neither statute relied on supports the right the circuits created. This amicus brief supplements their textual analysis by showing how the judicially concocted right to competence and a stay undermines legitimate state efforts to enforce their criminal judgments.

While federal habeas review provides a legitimate "'guard against extreme malfunctions in the state criminal justice systems,'" it also "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some

admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Id.* at 786-87 (citations omitted). The atextual right to be competent to proceed in federal habeas review – first created by the Ninth Circuit nearly a decade ago – compounds those problems by generating lengthy competency litigation in death penalty habeas cases even when a stay is ultimately denied. And competency litigation has expanded beyond just the Ninth Circuit to courts across the nation.

Neither the Constitution nor any Act of Congress creates a right to competence to assist habeas counsel. This Court should therefore hold that such a right does not exist – and put an end to the indefinite stays and protracted litigation in federal habeas cases that has resulted from the decisions of the Ninth and Sixth Circuits.

ARGUMENT

Through 18 U.S.C. § 3599(a)(2), Congress provided funded counsel to state death row inmates to prosecute their federal habeas challenges to their capital convictions and death sentences. The Ninth Circuit has read into that provision an additional right: the right to be competent to assist their federally funded habeas counsel. The Ninth Circuit did not purport to find the additional right in the text of § 3599(a)(2). Rather, it based the right on a purported

"common law tradition" that "inform[s] [its] interpretation of the statutes Congress has enacted." *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 812-13 (9th Cir.), *cert. denied*, *Woodford v. Rohan*, 540 U.S. 1069 (2003). Applying this court-created rule, the Ninth Circuit ordered the federal district court to stay Gonzales's death sentence. *Gonzales*, Pet. App. A8-9. The Ninth Circuit's atextual right and the remedy created for it allows an inmate to use § 3599(2) as a means to halt the habeas action he has initiated rather than as a means to prosecute it.

The Sixth Circuit recently created the same right. It did so by importing the statute governing competency proceedings in federal criminal prosecutions into federal habeas challenges to state convictions. *Carter*, Pet. App. 4a-9a. The Sixth Circuit adopted the same remedy the Ninth Circuit imposes: an indefinite stay. *Id.* at 13a-15a.

As Arizona and Ohio explain in their merits briefs, the Ninth and Sixth Circuits improperly rewrote or applied federal statutes to create a right to be competent to proceed in habeas review. The amici States offer this brief to explain the practical detriments to their legitimate interests that these improperly created rights perpetuate.

Competency-Based Stays And Competency Litigation In Federal Habeas Cases Unjustifiably Infringe On The States' Legitimate Interests In The Finality Of Their Presumptively Valid Judgments

The judicially-created rules in these two cases allow a habeas petitioner in a capital case to obtain relief – a delay, perhaps forever, in executing their sentence – even though the petitioner has failed to prove that his conviction or sentence resulted from an "'extreme malfunction[ ] in the state criminal justice systems.'" *Richter*, 131 S. Ct. at 787 (citations omitted). Such an indefinite, and potentially permanent, stay unreasonably interferes with the States' interests in punishing their worst offenders.

Unlike any other habeas petitioner, a death-sentenced petitioner has every incentive to find ways to postpone a federal court's decision on whether his sentence resulted from an "extreme malfunction" in state processes. If he loses, his sentence will be carried out sooner. Even if he wins, he may be retried and resentenced to death. An indefinite stay, on the other hand, will postpone the merits inquiry, and with it, the execution of his death sentence.

This Court has recognized that "[i]n particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death." *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). The Court has also recognized that staying federal habeas cases too frequently

undermines the Anti-Terrorism and Effective Death-Penalty Act's purpose to reduce delays in federal habeas litigation. *Id.* at 276-77. Above all, the Court has recognized that a habeas petition "should not be stayed indefinitely." *Id.* at 277. Yet, the rule adopted by the Ninth and Sixth Circuits potentially permits a petitioner to do just that.[1]

And even if the death-sentenced petitioner cannot convince the court that he is incompetent to proceed and win an indefinite stay, he has every reason to pursue the issue. Competency litigation provides another avenue for delay. Challenging his competency costs the petitioner nothing regardless of how frivolous the challenge may be. If he succeeds, he may avoid execution until his competence to assist habeas counsel is restored. If his competence is never determined to be restored, he may avoid execution forever without ever proving that his sentence was unconstitutional (or that he is incompetent to be executed under the standard of *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986)). Even if he does not succeed in procuring a stay, the additional delay generated by litigating his competence will "prolong [his] incarceration and avoid execution of [his death] sentence" at

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[1] The Seventh Circuit has also adopted staying a habeas petition as the remedy when a petitioner is incompetent to proceed. But it did not actually recognize that a right to be competent to proceed exists. Rather, it assumed the right existed because the respondent did not argue otherwise. *Holmes v. Levenhagen*, 600 F.3d 756 (7th Cir. 2010); *Holmes v. Buss*, 506 F.3d 576, 578-79 (7th Cir. 2007).

least for the period of that litigation. *See Rhines*, 544 U.S. at 277-78. This is precisely the kind of interference in state criminal justice processes that federal stays should avoid. *Id.*

Post-*Rohan* competency litigation in the Ninth Circuit has been widespread.[2] It has also been widespread in circuits where no right to be competent has been recognized. Those circuits have avoided deciding whether the right exists at all by finding – after often lengthy delays – that the petitioner was in fact competent. *See Ferguson v. Sec. Dep't of Corrections*, 580 F.3d 1183, 1222 (11th Cir. 2009), *cert. denied, Ferguson v. McNeil*, 130 S. Ct. 330 (2010); *Clayton v. Roper*, 515 F.3d 784, 790 n.2 (8th Cir.), *cert. denied*, 555 U.S. 1003 (2008); *Holmes v. Buss*, 506 F.3d at 578-79, *appeal after remand*, *Holmes v. Levenhagen*,

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[2] *See, e.g.*, *White v. Ryan*, No. 08-cv-08139-GMS, 2012 WL 273707 (Jan. 31, 2012); *Mulder v. Baker*, No. 3:09-CV-00610-PMP-WGC (Sept. 26, 2011); *Gonzales*, Pet. App. A; *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009); *Blair v. Cullen*, No. CV 99-6859, 2010 WL 5563896 (C.D. Cal. Mar. 21, 2010), *report and recommendation adopted by Blair v. Cullen*, 2011 WL 91949 (C.D. Cal. Jan. 04, 2011); *Lewis v. Ayers*, No. CIV S-02-0013, 2010 WL 364504 (E.D. Cal. Jan. 26, 2010), *report and recommendation adopted by Lewis v. Ayers*, 2010 WL 3502667 (E.D. Cal. Sept. 2, 2010); *Rogers v. McDaniel*, No. 3:02-cv-0342, 2008 WL 820088 at *3 (D. Nev. Mar. 24, 2008); *Hill v. Ayers*, No. 4-94-cv-641, 2008 WL 683422 (N.D. Cal. Mar. 10, 2008). In one case, a death-sentenced petitioner relied on the *Rohan* right to be competent to ask to reopen his federal habeas action under Fed. R. Civ. P. 60(b). *Van Adams v. Schriro*, No. CV-04-1359, 2009 WL 89465 (D. Ariz. Jan. 14, 2009).

600 F.3d 756; *Mines v. Dretke*, No. 03-11137, 2004 WL 2913069 (5th Cir. Dec. 16, 2004).[3]

Competency litigation has often proven to be lengthy. In Florida, for example, a death-sentenced inmate named Ferguson relied on *Rohan* to challenge his competence to proceed. *Ferguson v. Dep't of Corrections*, No. 1:95-cv-00573 at doc. no. 58. It took twenty months to resolve whether Ferguson was competent, which, in turn, postponed disposing of the second amended petition for approximately the same period. *Id.* at doc. nos. 57, 58, 107, 108.

In *Clayton v. Luebbers*, the litigation to determine whether Clayton was in fact competent lasted over two years. *Clayton v. Luebbers*, No. 4:02-cv-08001, doc. nos. 79 and 104. It included a seven month sojourn at the United States Medical Center for Federal Prisoners. *Clayton*, 515 F.3d at 789. The evaluator took ten months from the order for an evaluation to issue her report. *Clayton*, No. 4:02-cv-08001, doc. nos. 79 and 104. Clayton took another five months to renew his motion for a stay based on his alleged incompetence to proceed with his habeas petition. *Id.* at doc. nos. 93 and 104.

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[3] The Northern District of Oklahoma, however, ruled that no right to be competent to proceed in federal habeas exists. It rejected the Ninth Circuit's reading of § 3599 to create such a right because the statute's plain language does not support it. *Cole v. Workman*, No. 08-CV-0328-CVE-PJC, 2011 WL 3862143 at *15-17 (N.D. Okla. 2011).

In *Dansby v. Norris*, No. 02-cv-04141, 2009 WL 485418 (W.D. Ark. Feb. 26, 2009), the district court, citing *Clayton*, "assume[d] that competency is required, without answering whether an inmate must be competent to proceed in a habeas action." *Id.* at *2. That was over three years ago. The competency issue remains unresolved. *Dansby v. Norris*, No. 4:02-cv-04141, doc. nos. 140 and 167.

In Utah, death row inmate Ronald Lafferty asked the federal district court to stay his habeas action, alleging that he is incompetent to proceed. *Lafferty v. Turley*, No. 2:07-cv-00322, doc. no. 89. The district court has stayed the case and held the legal question of Lafferty's right to be competent in abeyance pending a determination of his actual competence. *Id.* at doc. no. 104, 164.[4] That issue remains unresolved. Consequently, Lafferty's federal habeas case has not materially advanced to a final resolution for two and one-half years.[5] *See, e.g., Carter*, Pet. App. 27a-28a (nearly three years of litigation from the date of the motion for competency determination until the final order on Carter's competency); *Holmes v. Davis*, 00-cv-04177-SEB-DML, doc. nos. 3 and 115 (over four

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[4] The order for no. 164 is under seal and does not appear on the PACER docket.

[5] The district court did require Lafferty to file a reply in support of whatever habeas claims his counsel determined did not require his input. *Id.* at doc. no. 164. Otherwise, nothing has been done on the merits since the district court stayed the case in November 2009 pending the competency determination.

years of litigation from remand in *Buss*, 506 F.3d 576, until final order on competency determination).

And a determination of incompetence will not always end a death-sentenced petitioner's resistance to his habeas case moving forward. They may also oppose the States' efforts to restore them to competence so that the case may proceed, as Gonzales attempted to do. He argued that, not only should district court stay his federal habeas case because he was incompetent to proceed, but also that he could never be restored to competence by forcible medication. According to him, his case did not meet this Court's criteria for forcible medication to restore competence in *Sell v. United States,* 539 U.S. 166 (2003). *Gonzales*, Pet. App. B5-7. If successful, such a maneuver would both impede the States' right to carry out their lawful sentences and prohibit the States from removing the impediment.

As these examples show, litigation related to whether a death-sentenced petitioner is competent to proceed in the habeas case he initiated can be lengthy. And as shown, a death-sentenced petitioner has every incentive to delay – permanently, if possible – the resolution of his case.

But any time a federal court delays its review of a state judgment, it necessarily infringes on a state's interest in carrying out that judgment. Where the delay does not further the legitimate federal interest in correcting "extreme malfunctions" in state judicial systems that result in constitutional violations, it is

an unreasonable incursion into the States' compelling interests. *See In re Blodgett*, 502 U.S. 236, 239 (1992). As Arizona and Ohio have shown, a habeas petitioner can provide little, if any, assistance to their federal habeas counsel. *See also Cole*, 2011 WL 3862143 at *16-17 (recognizing that Cole's assistance was of little use because the federal court's review was limited to the record developed in state court and other sources of information existed for anything beyond that record).

Competency stays and competency litigation delays are particularly unacceptable because they arise from a series of Ninth Circuit decisions that improperly read a right to competency in habeas proceedings into a federal statute that provides nothing of the sort. And the Sixth Circuit has followed suit by misapplying a statute that governs competency procedures in federal criminal prosecutions to federal habeas review of a state judgment. The law does not and should not permit a death-sentenced petitioner to first initiate then halt, perhaps forever, the determination of whether his presumptively valid sentence is unconstitutional. This Court should therefore confirm that the atextual right to be competent to proceed in federal habeas does not in fact exist.

CONCLUSION

For the reasons argued, the Court should reverse the Ninth and Sixth Circuits' decisions.

Respectfully submitted,

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